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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 108.

MINNESOTA STATE LIBRARY

J. M. CERALLOS AND COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1906.

(20,763.)

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SUPREME COURT OF THE UNITED STATES.

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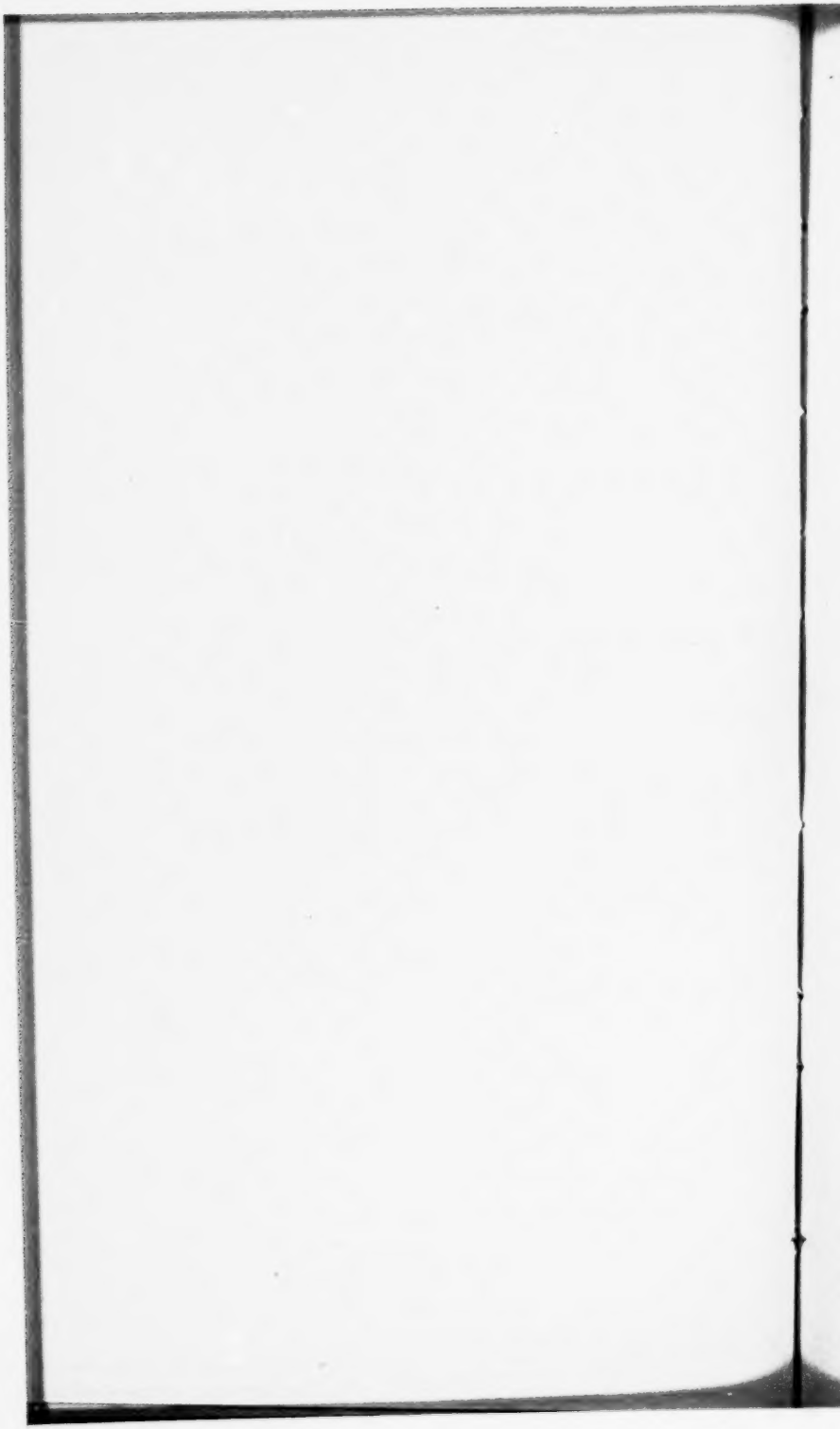
JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1908.



1 In the Court of Claims.

No. 23689.

J. M. CEBALLOS & COMPANY, a Firm Composed of Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson, Petitioners,
vs.
THE UNITED STATES.

I.—*Petition.*

Filed August 15, 1903.

The petition of J. M. Ceballos & Company respectfully shows to the Court:

1st. That Juan M. Ceballos, John S. Fiske and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., and under said firm name, with their principal office at 27 William Street, New York City, in the State of New York, were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the repatriated Spanish prisoners were transported from the Phillippine Islands to Spain.

The said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth and the said Anderson C. Wilson is a British subject, having the right as such to sue in this Court.

2nd. That by the written terms of capitulation of the Spanish Army in the Philippine Islands made and executed between the representatives of the United States and Spanish Governments, dated the — day of ——, 1898, it was agreed by section 4 thereof
2 that "all questions relating to the repatriation of officers and men of the Spanish forces and their families and all the expense which said repatriation may occasion shall be referred to the Government of the United States at Washington."

3d. That by the Treaty of Peace made and entered into by and between the representatives of the Governments of the United States and Spain, at Paris, on December 10, 1898, it was stipulated in the first paragraph of Article Five, that "the United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to

obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

4th. That on the 7th day of October, 1899, General Otis, Commanding the United States forces in the Philippine Islands, in accordance with the intent and terms of capitulation and the treaty as above set out, requested authority by cablegram from the Secretary of War of the United States for the sick Spanish officers, prisoners of war, to depart for Spain, in the following language to wit:

3 "MANILA, P. I., *Oct.* 7, 1898.

Adjutant General, Washington:

Request permission to allow sick Spanish officers, prisoners of war, to depart for Spain. Spanish General Commanding urgently requests.

OTIS,
Commanding."

To which the Adjutant General replied by cablegram authorizing the departure of the sick Spanish officers in the following words:

"ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1898.

General Otis, Manila:

Secretary of War approves your request to allow sick Spanish officers, prisoners of war, to depart for Spain.

H. C. CORBIN,
Adj. Gen'l.

5th. On October 24, 1898, General Otis, commanding the United States forces in the Philippine Islands, requested permission of the United States authorities at Washington, through the Adjutant General of the Army, to transport to Spain sick Spanish prisoners of war by the following cablegram, to wit:

"MANILA, P. I., *October* 24, 1898.

Adjutant General, Washington:

Spanish transport ship expected to arrive to-morrow from Barcelona wishes to transport to Spain eight hundred of the eleven hundred sick Spanish prisoners of war now here. This would relieve situation. Shall permission be given?

OTIS."

To which the Adjutant General of the Army forwarded the permission of the Secretary of War in the following language, to wit:

"OCTOBER 25, 1898.

General Otis, Manila:

Secretary of War approves sending sick Spanish prisoners
4 to Spain. Let them go when co-venient opportunity offers.

H. C. CORBIN,
Adjutant General."

6th. On January 20, 1899, R. A. C. Smith, attorney-in-fact for J. M. Ceballos & Company, petitioners herein, requested the Honorable R. A. Alger, Secretary of War of the United States, to authorize the transportation of a number of prisoners of war from Manila, Philippine Islands, to Spain in the following telegram, to wit:

"NEW YORK CITY, *January 20th,* 1899.

Hon. R. A. Alger, Secretary of War, Washington, D. C.:

Would respectfully suggest that inasmuch as the Spanish Trans-Atlantic Steamship Company has now in Manila ready to sail for Spain one of its large steamers, fitted out as transport, permission be given them to bring home whatever number of prisoners of war from Manila to Spain, the steamer can carry conveniently. The price of the service to be the same as you may contract for under the proposals which have been invited for February 1st. From the manner in which the Trans-Atlantic Line can carry out this service, I am satisfied that if they are the successful bidders on February 1st, every prisoner of war will be out of Manila by March 20th.

R. A. C. SMITH.

2:02 p. m."

And the Honorable R. A. Alger, Secretary of War of the United States, directed the return of the Spanish prisoners in the following telegram to General Otis, Commanding the United States forces in the Philippine Islands, to wit:

"JANUARY 21, 1899.

To General Otis, Manila:

Bids are asked for sending Spanish prisoners to Spain.
5 In the meantime, load the Trans-Atlantic Steamship Company's ship now in Manila, terms to be settled when bids are opened. Count prisoners as they go aboard and report. Are there any other ships available?

ALGER, *Secretary.*"

And the Honorable Secretary of War replied to the telegram of said R. A. C. Smith as follows, to wit:

"JANUARY 21, 1899.

Hon. R. A. C. Smith, 100 Broadway, New York City:

Have cabled General Otis to load ship you mention on the terms mentioned by you, with Spanish prisoners.

(Signed) R. A. ALGER,
Secretary of War."

7th. That on January 20, 1899, the United States, by M. I. Ludington, Quartermaster-General of the Army, advertised for bids for transportation of Spanish prisoners of war from the Philippine Islands to Cadiz, or such other ports of Spain as might thereafter be designated, stating that cabin accommodations should be supplied for the officers, and third class, or steerage accommodations, for the enlisted men. Said advertisement being in the following form, to wit:

"WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, D. C., *January 20th*, 1899.

Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manilla or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third class or steerage accommodations, having suitable galley accommodations, conforming to the United States re-
6 quirements as to space and ventilation, for the enlisted men. The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports, to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows: One thousand complete rations. Meat—Pork, 1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard-bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds. Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief Quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived

with her passengers at point of destination. The number of officers and men counted on board at place of embarkation by the Quartermaster is to determine the number to be paid for. Proposals should be addressed to the Depot Quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock M., standard time, on the 1st day of February, 1899, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

M. I. LUDINGTON,
Quartermaster-General, U. S. Army."

7 8th. That the petitioners, J. M. Ceballos & Company, through R. A. Smith, their attorney in fact, in compliance with said advertisement, submitted in due form of law a bid for the transportation of said Spanish prisoners, and in the form following, to wit:

"SIR: In accordance with the advertisement of General M. I. Ludington, Quartermaster-General, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., Agents of the Compania Transatlantica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary owing to climatic conditions and length of voyage.

I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

for each officer..... $215.00;
for each enlisted man..... 73.75.

It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

I will furnish a satisfactory bond for the faithful fulfillment of this service.

Very respectfully,
(Signed) R. A. C. SMITH."

8 And to said bid or proposal was attached a list containing the name and classification of each vessel, its tonnage capacity and all other information required as to said vessels by the advertisement for bids as aforesaid. And the said petitioners having been duly and legally awarded the contract for the transportation of the said prisoners in accordance with the advertisement and their bid as above set out, through their attorney-in-fact R. A. C. Smith, entered into a written contract on the 4th day of March, A. D. 1899, with the United States, through the Honorable R. A. Alger, Secretary of War, for the transportation, subsistence and landing of the said Spanish prisoners upon certain fixed terms, which said contract is in the words following, to wit:

"Whereas under the terms of the Treaty of Peace entered into by and between the representatives of the Government of the United States and of Spain, signed at Paris, on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

9 And whereas, sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Cabellos and Company, of New York, having been duly accepted by the Secretary of War of the United States,

Therefore this Article of Agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the Treaty of Peace, referred to and quoted herein.

The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from

the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

The said Company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the Company shall be equal in every respect to the United States Army garrison rations.

The Company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

10 In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen — ($215.00) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain.

It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company and payment to the said Company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Phil-

ippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States,
11 is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

In witness whereof, we hereunto set our hands and seals this 4th day of March, A. D. 1899.

(Sgd.) R. A. ALGER, [SEAL.]
Sec'ty of War.
" J. M. CEBALLOS & CO., [SEAL.]
By R. A. C. SMITH, *Attorney-in-Fact.*

Witnesses:

(Sgd.) G. D. H. HOPKINS,
As to R. A. A.
" L. F. RANDOLPH.

9th. That under the aforesaid terms of capitulation of the Spanish forces in the Philippine Islands and of the Treaty of Paris of December 10, 1898, a public exigency existed such as to require the repatriation of large numbers of the Spanish prisoners before bids for their transportation could be advertised for and a formal contract made, and in compliance with the several propositions by telegraph and cable and the replies thereto, as above set out, relating to the repatriation of the Spanish prisoners in the Philippine Islands, and also in accordance with various other agreements made between the United States, through the Secretary of War, and the petitioners, through their attorney-in-fact R. A. C. Smith, as well as under the formal contract of March 4, 1899, hereinbefore set forth at length, the said J. M. Ceballos and Company, petitioners herein, between November 8, 1898, and July 14, 1901, inclusive, transported, subsisted and landed in Spain the following numbers and classes of prisoners as designated by the United States officers, authorized and appointed to such duty, to wit:

(*a.*) Three thousand four hundred and forty-five persons transported, subsisted and landed as first-class or cabin passengers at two hundred and fifteen dollars ($215) each, aggregating $740,675.00

12

(*b.*) Four hundred and fifteen persons, minor children of the above, transported, subsisted and landed as first-class or cabin passengers at one hundred and seven dollars and fifty cents ($107.50) each (½ full rate) aggregating.. 44,612.50

(*c.*) Thirteen thousand six hundred and forty-seven persons transported, subsisted and landed as third-class or steerage passengers at seventy-three dollars and seventy-five cents ($73.75) each, aggregating.....	$1,006,466.25
(*d.*) Twenty persons, minor children of those last named above, transported, subsisted and landed as third-class or steerage passengers at thirty-six dollars and eighty-seven and one-half cents ($36.875) (½ third-class rate), aggregating	737.50
Total persons 17,527. Total charge...	$1,792,491.25

Making the whole number of persons so transported, subsisted and landed in Spain, designated and classified by United States officers as above set out, seventeen thousand five hundred and twenty-seven, being all the persons required to be transported, for which the United States under the several agreements aforesaid promised and agreed to pay the petitioners at the rates and for the classes of transportation as above set forth, the aggregate sum of one million seven hundred and ninety-two thousand four hundred and ninety-one dollars and twenty-five cents ($1,792,491.25).

10th. That the Government of the United States has paid to your petitioners from time to time various sums of money on the dates named as follows, to wit:

13 PAYMENTS.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on a/c by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20/99...	1019	7067	.....	.....	.....	$666,248.63	($74,027.62, 10% retained by Gov't).
Nov. 28/99...	131	1198	.....	.....	.....	190,545.12	(inc. previous 10% as above).
July 30/1900.	288	3728	1302	406	.....	447,853.75	
Oct. 6/1900.	148	1425	53	.....	.....	140,822.50	
April 11/1902.	.....	.....	.....	.....	393	28,983.75	
April 21/1902.	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3/1902.	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st & 3rd class.)
Oct. 31/1902.	.....	16	.....	.....	.....	1,180.00	
	.....	19	.....	.....	.....	1,401.25	
Nov. 3/1902.	.....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
	1	.....	.....	.....	.....	215.00	
	.....	10	.....	.....	.....	737.50	
	.....	1	.....	.....	.....	73.75	
Nov. 3, rec'd & ret'd.	8	17	6	.....	.....	3,416.25	
Feb. 26/3, deposited.....	1	1	2	.....	.....	436.25	
	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
	.....	.....	12	.....	18	4,755.00	
M'ch 7/1903,	.....	.....	8	.....	2	1,020.00	
Sup. Bill No.	.....	.....	9	.....	3	1,308.75	
22.....	.....	.....	1	.....	.....	73.75	
	2	less not	1 all'd.	.....	.....	356.25	
Totals..	1613	13583	1392	406	416	$1,544,595.00	

Being 1,613 officers, 338 civil officials @ $215 each; 13,583
14 enlisted men, 1,392 wives and major children, 78 officers @ $73.75 each; 406 minor children @ $36.875 each, making in the aggrega e $1,544,595, and leaving due now to your petitioner under said contracts the sum of $247,896.25.

11th. That while no difference of rate or charge was made in the contracts above set out between adults and minor children transported the petitioners nevertheless following the usual custom in the carrying of passengers by sea, have charged only one-half rate for the children under — (10) years of age, so that the charge for 415 such children of officers is $107.50 each and for twenty (20) such chil-

dren of enlisted men $36.75 each, being in both cases one-half the rate for adults of each class so transported.

12th. That the full original claim has been presented to the War Department of the United States and the several amounts above specified in paragraph 10 have been paid in part of said claim, but the balance has not been paid, and as petitioners are informed, because it is claimed by the United States that as to all transports sailing between February 20, 1900, and July 14, 1901, inclusive, payment can be made only for the number of persons specified in the requisition of the Quartermaster at Manila and not for the number actually transported, subsisted and landed, and also because it is further claimed that the wives and children of officers and officials, although transported and subsisted as first-class passengers and furnished cabin accommodations shall be paid for at only third-class rates.

13th. That neither said claim nor any part thereof, or any interest therein, has been assigned or made over to any other person; that the said petitioners are justly entitled to the amount herein claimed from the United States after allowing all just claims and set-
15 offs. And the amount claimed, to wit: $247,896.25 has been lost to the petitioners by the failure of the United States, its officers and agents to carry out and perform the contracts as above set out. That said claim for two hundred and forty-seven thousand eight hundred ninety-six dollars and twenty-five cents ($247,896.25) has never been presented to or acted on by Congress.

Wherefore your petitioners demand judgment against the United States for ($247,896.25) two hundred and forty-seven thousand eight hundred and ninety-six dollars and twenty-five cents.

JOHN J. HEMPHILL,
Att'y for Petitioner.

S. C. NEALE,
EDWIN H. DUFF,
Of Counsel.

STATE OF NEW YORK, *City and County of New York, ss:*

Personally appears John S. Fiske and makes oath and says that he is a member of the firm of J. M. Ceballos & Co., the petitioners herein; that the statements set forth in the above petition of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOHN S. FISKE.

Sworn to and signed before me this 13th day of August, 1903.

[SEAL.] GEO. L. STRONG,
Notary Public, New York County.

16 Petition No. 23689.

J. M. CEBALLOS & COMPANY, a Firm Composed of Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson, Petitioners,

vs.

THE UNITED STATES, Defendants.

II.—*Amended Petition.*

Filed August 15, 1903.

Amended Petition Filed October 31, 1903.

The amended petition of J. M. Ceballos & Company respectfully shows to the Court:

1st. That Juan M. Ceballos, John S. Fiske and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., and under said firm name, with their principal office at 27 William Street, New York City, in the State of New York, were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the rapatriated Spanish prisoners were transported from the Philippine Islands to Spain.

The said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth and the said Anderson C. Wilson is a British subject, having the right as such to sue in this Court.

2nd. That by the written terms of capitulation of the
17 Spaninsh Army in the Philippine Islands made and executed between the representatives of the United States and Spanish Governments, dated the 14th day of August, 1898, it was agreed by section 4 thereof that "all questions relating to the repatriation of officers and men of the Spanish forces and their families and all the expense which said repatriation may occasion shall be referred to the Government of the United States at Washington."

3rd. That by the Treaty of Peace made and entered into by and between the representatives of the Governments of the United States and Spain, at Paris, on December 10, 1898, it was stipulated in the first paragraph of Article Five, that "the United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

4th. That on the 7th day of October, 1898, General Otis, Commanding the United States forces in the Philippine Islands,
18 in accordance with the intent and terms of capitulation and the treaty as above set out, requested authority by cablegram from the Secretary of War of the United States for the sick Spanish officers, prisoners of war, to depart for Spain, in the following language, to wit:

"MANILA, P. I., *Oct.* 7, 1898.

Adjutant General, Washington:

Request permission to allow sick Spanish officers, prisoners of war, to depart for Spain. Spanish General Commanding urgently requests.

OTIS,
Commanding."

To which the Adjutant General replied by cablegram authorizing the departure of the sick Spanish officers in the following words:

"ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1898.

General Otis, Manila:

Secretary of War approves your request to allow sick Spanish officers, prisoners of war, to depart for Spain.

H. C. CORBIN,
Adj. Gen'l."

5th. On October 24, 1898, General Otis, commanding the United States forces in the Philippine Islands, requested permission of the United States authorities at Washington, through the Adjutant General of the Army, to transport to Spain sick Spanish prisoners of war by the following cablegram, to wit:

"MANILA, P. I., *October* 24, 1898.

Adjutant General, Washington:

Spanish transport ship expected to arrive to-morrow from Barcelona wishes to transport to Spain eight hundred of the eleven hundred sick Spanish prisoners of war now here. This would relieve situation. Shall permission be given?

OTIS."

19 To which the Adjutant General of the Army forwarded the permission of the Secretary of War in the following language, to wit:

"OCTOBER 25, 1898.

General Otis, Manila:

Secretary of War approves sending sick Spanish prisoners to Spain. Let them go when convenient opportunity offers.

H. C. CORBIN,
Adjutant General."

6th. On January 20, 1899, R. A. C. Smith, attorney-in-fact for J. M. Ceballos & Company, petitioners herein, requested the Honorable R. A. Alger, Secretary of War of the United States, to authorize the transportation of a number of prisoners of war from Manila, Philippine Islands, to Spain in the following telegram, to wit:

"NEW YORK CITY, *January 20th*, 1899.

Hon. R. A. Alger, Secretary of War, Washington, D. C.:

Would respectfully suggest that inasmuch as the Spanish Trans-Atlantic Steamship Company has now in Manila ready to sail for Spain one of its large steamers, fitted out as transport, permission be given them to bring home whatever number of prisoners of war from Manila to Spain, the steamer can carry conveniently. The price of the service to be the same as you may contract for under the proposals which have been invited for February 1st. From the manner in which the Trans-Atlantic Line can carry out this service, I am satisfied that if they are the successful bidders on February 1st, every prisoner of war will be out of Manila by March 20th.

R. A. C. SMITH.

2.02 p. m."

20 And the Honorable R. A. Alger, Secretary of War of the United States, directed the return of the Spanish prisoners in the following telegram to General Otis, Commanding the United States forces in the Philippine Islands, to wit:

"JANUARY 21, 1899.

To General Otis, Manila:

Bids are asked for sending Spanish prisoners to Spain. In the meantime, load the Trans-Atlantic Steamship Company's ship now in Manila, terms to be settled when bids are opened. Count prisoners as they go aboard and report. Are there any other ships available?

ALGER, *Secretary.*"

And the Honorable Secretary of War replied to the telegram of said R. A. C. Smith as follows, to wit:

"JANUARY 21, 1899.

Hon. R. A. C. Smith, 100 Broadway, New York City:

Have cabled General Otis to load ship you mention on the terms mentioned by you, with Spanish prisoners.

(Signed) R. A. ALGER,
Secretary of War."

7th. That on January 20, 1899, the United States, by M. I. Ludington, Quartermaster-General of the Army, advertised for bids for transportation of Spanish prisoners of war from the Philippine Islands to Cadiz, or such other ports of Spain as might thereafter be designated, stating that cabin accommodations should be supplied for the officers, and third-class or steerage accommodations,
21 for the enlisted men. Said advertisement being in the following form, to wit:

"WAR DEPARTMENT,
QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, D. C., *January 20th*, 1899.

Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manila or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men. The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports, to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows: One thousand complete rations. Meat—Pork, 1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds. Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth
22 accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief Quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived

with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the Quartermaster is to determine the number to be paid for. Proposals should be addressed to the Depot Quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock M., standard time, on the 1st day of February, 1899, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

M. I. LUDINGTON,
Quartermaster-General, U. S. Army.".

8th. That the petitioners, J. M. Ceballos & Company, through R. A. C. Smith, their attorney-in-fact, in compliance with said advertisement, submitted in due form of law a bid for the transportation of said Spanish prisoners, and in the form following, to wit:

"SIR: In accordance with the advertisement of General M. I. Ludington, Quartermaster-General U. S. Army, copy of which is hereto attached, I propose, on behalf of Messers. J. M. Ceballos & Co., Agents of the Compania Transatlantica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain.
23 (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary owing to climatic conditions and length of voyage.

I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

for each officer..... $215.00;
for each enlisted man..... 73.75.

It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

I will furnish a satisfactory bond for the faithful fulfillment of this service. Very respectfuliy,

(Signed) R. A. C. SMITH."

And to said bid or proposal was attached a list containing the name and classification of each vessel, its tonnage capacity and all other information required as to said vessels by the advertisement for bids as aforesaid. And the said petitioners having been duly and legally awarded the contract for the transportation of the said prisoners in accordance with the advertisement and their bid as above set out, through their attorney-in-fact R. A. C. Smith, entered into a written contract on the 4th day of March, A. D. 1899, with the United States, through the Honorable R. A. Alger, Secretary of War, for the transportation, subsistence and landing of the said Spanish prisoners upon certain fixed terms, which said contract is in the words following, to wit:

"Whereas under the terms of the Treaty of Peace entered into by and between the representatives of the Government of the United States and of Spain, signed at Paris, on December 10, 1898,
24 it is mutually agreed and stipulated in the first paragraph of Article V, that

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article VI, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

And whereas, sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Cabellos and Company, of New York, having been duly accepted by the Secretary of War of the United States,

Therefore this Article of Agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the Treaty of Peace, referred to and quoted herein.

The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by

the Secretary of War, and to furnish to them subsistence while en-
route and on board the ships, and to deliver them on shore in Spain.

The said Company further agrees that for the purpose
25 herein stipulated they will provide a sufficient number of
steamships for the safe and comfortable transportation of
the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the Company shall be equal in every respect to the United States Army garrison rations.

The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain.

It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any,
earned by any such steamer or steamers to be paid by the
26 United States at the rate of fifteen cents (15c.) per gross ton
register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company and payment to the said Company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-

four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

No member or delegate to Congress nor any person belonging to, or employed in, the miltary service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

In witness whereof, we hereunto set our hands and seals this 4th day of March, A. D. 1899.

(Sgd.) R. A. ALGER, [SEAL.]
Sec't'y of War.

" J. M. CEBALLOS & CO., [SEAL.]
By R. A. C. SMITH, *Attorney-in-fact.*

Witnesses:

(Sgd.) G. D. H. HOPKINS,
As to R. A. A.

" L. F. RANDOLPH.

9th. That under the aforesaid terms of capitulation of the Spanish forces in the Philippine Islands and of the treaty of Paris of December 10, 1898, a public exigency existed such as to require the repatriation of large numbers of the Spanish prisoners before bids for their transportation could be advertised for and a formal contract
27 made, and in compliance with the several propositions by telegraph and cable with the replies thereto, as above set out, relating to the repatriation of the Spanish prisoners in the Philippine Islands, and also in accordance with various other agreements made between the United States, through the Secretary of War, and the petitioners, through their attorney-in-fact R. A. C. Smith, as well as under the formal contract of March 4, 1899, hereinbefore set forth at length, the said J. M. Ceballos and Company, petitioners herein, between November 8, 1898, and August —, 1901, inclusive, transported, subsisted and landed in Spain the following numbers and classes of prisoners as designated and classified by the United States officers, authorized and appointed to such duty, to wit:

(*a*) Three thousand eight hundred and sixty persons transported, subsisted and landed as first-class or cabin passengers at two hundred and fifteen ($215) dollars each, aggregating.	$829,900.00
(*b*) Thirteen thousand six hundred and sixty-seven persons transported, subsisted and landed as third-class or steerage passengers at seventy-three dollars and seventy-five cents ($73.75) each, aggregating	1,007,941.25
Total persons, 17,527. Total charge.....	$1,837,841.25

Making the whole number of persons so transported, subsisted and landed in Spain, designated and classified by United States officers as above set out, seventeen thousand five hundred and twenty-seven,

being all the persons required to be transported, for which the United States under the several agreements aforesaid promised and agreed to pay the petitioners at the rates and for the classes of transportation as above set forth, the aggregate sum of one million eight hundred and thirty-seven thousand eight hundred and forty-one dollars and twenty-five cents ($1,837,841.25).

That the rates agreed upon and charged as above set forth, for the services rendered, were reasonable, fair and just.

28 10th. That the Government of the United States has paid to your petitioners from time to time various sums of money on the dates named as follows, to wit:

PAYMENTS.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on a/c by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20/99...	1019	7067	.....	.....	.....	$666,248.63	($74,027.62, 10% retained by Gov't).
Nov. 28/99...	131	1198	.....	.....	.....	190,545.12	(inc. previous 10% as above).
July 30/1900.	288	3728	1302	406	.....	447,853.75	
Oct. 6/1900.	148	1425	53	.....	.....	140,822.50	
April 11/1902.	.....	.....	.....	.....	393	28,983.75	
April 21/1902.	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3/1902.	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st & 3rd class.)
Oct. 31/1902.	.....	16	.....	.....	.....	1,180.00	
	.....	19	.....	.....	.....	1,401.25	
Nov. 3/1902.	.....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
	1	.....	.....	.....	.....	215.00	
	.....	10	.....	.....	.....	737.50	
	.....	1	.....	.....	.....	73.75	
Nov. 3, rec'd & ret'd.	8	17	6	.....	.....	3,416.25	
Feb. 26/3, deposited.....	1	1	2	.....	.....	436.25	
M'ch 7/1903, Sup. Bill No. 22.....	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
	.....	.....	12	.....	18	4,755.00	
	.....	.....	8	.....	2	1,020.00	
	.....	.....	9	.....	3	1,308.75	
	.....	.....	1	.....	.....	73.75	
	2	less not	1 all'd.	.....	.....	356.25	
Totals..	1613	13583	1392	406	416	$1,544,595.00	

Being 1,613 officers, 338 civil officials @ $215 each; 13,583 enlisted men, 1,392 wives and major children, 78 officers @ $73.75 each; 406 minor children @ $36.875 each, making in the aggregate $1,544,595, and leaving due now to your petitioners under said contracts the sum of $293,246.25.

11th. That the full original claim has been presented to the War Department of the United States and the several amounts above specified in paragraph 10 have been paid in part of said claim, but the balance has not been paid, and as petitioners are informed, because it is claimed by the United States that as to all transports sailing between February 20, 1900, and July 14, 1901, inclusive, payment can be made only for the number of persons specified in the requisition of the Quartermaster at Manila and not for the number actually transported, subsisted and landed, and also because it is further claimed that the wives and children of officers and officials, although transported and subsisted as first-class passengers and furnished cabin accommodations shall be paid for at only third-class rates.

12th. That neither said claim nor any part thereof, or any interest therein, has been assigned or made over to any other person; that the said Juan M. Ceballos and John S. Fiske ,the petitioners, have at all times borne true allegiance to the Government of the United States, and neither of the three petitioners first above named has in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and they believe the facts as stated in said petition to be true; that the said petitioners are justly entitled to the amount herein claimed from the United States after allowing all just claims and set-offs. And the amount claimed, to wit: $293,246.25 has been lost to the petitioners by the failure of the United States, its officers and agents, to carry out and perform the contracts as above set out. That said claim for two hundred and ninety-three thousand two hundred and forty-six dollars and twenty-five cents ($293,246.25) has never been presented to or acted on by Congress.

Wherefore your petitioners demand judgment against the United States for two hundred and ninety-three thousand two hundred and forty-six dollars and twenty-five cents ($293,246.25).

JOHN J. HEMPHILL,
Att'y for Petitioner.

S. C. NEALE,
EDWIN H. DUFF,
Of Counsel.

DISTRICT OF COLUMBIA, *City of Washington, To wit:*

Personally appeared John J. Hemphill and under oath declared that he is the attorney of record in this case; that he has carefully read the foregoing amended petition, and that the statements therein set forth of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOHN J. HEMPHILL.

Subscribed and sworn to before me this 30th day of October, 1903.

[SEAL.] EMORY H. BOGLEY,
Notary Public.

31 No. 23689.

J. M. CEBALLOS & CO.
v.
THE UNITED STATES.

III. *Counterclaim on Behalf of the United States.*

Filed June 3, 1905.

Comes now the United States, by its Attorney-General, and, further answering the petition of claimant heretofore filed herein and for counterclaim thereto, states as follows:

First. That the claimant herein is indebted to the United States in the sum of $371,988.75 for moneys paid to claimants by the United States on account of the first five shipments of Spanish prisoners of war from the Philippine Islands, consisting of civil and military officers, enlisted men, minor children, and others in the vessels of the claimant company, the dates of sailing of said vessels being November 7, December 13, and December 21, 1898, and January 1 and January 17, 1899; said amount having been paid to said claimant company on account of said shipments without authority of law prior to the execution of any contract, express or implied, between the United States and the claimant company or anyone in its behalf.

32 Second. Further answering said petition and for a second counterclaim, the defendant states as follows:

That the claimant is indebted to the United States in the sum of $12,788.75 for moneys unlawfully paid the claimant company by the United States for transportation of prisoners of war and others who were shipped in the vessels of the claimant company from the Philippine Islands upon various dates, but who were not in fact landed in Spain; the contract under which said shipments were made bearing date the 4th day of March, A. D. 1899, and providing, among other things, as follows:

In consideration of the faithful performance of the foregoing stipulations and in compensation therefor the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Company, for the transportation, subsistence, and delivery on shore of each commissioned officer the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons having been transported, subsisted, and delivered on shore in Spain.

Third. For a further counterclaim the United States alleges that the claimant herein is indebted unto it in the sum of $9,721.25 for moneys overpaid to the claimant company on supplemental bills submitted by them for shipment No. 22, on the *San Ignacio*
33 *de Loyola,* November 25, 1899, and No. 23, on the *Leon XIII,* December 18, 1899. The entire number of military officers and enlisted men shipped at Manila on these two vessels being paid for by the Quartermaster's Department at the rate claimed by the company, and on supplemental bills, the company was again allowed and paid by the accounting officers for 5 military officers at $215 each, and for 91 enlisted men at $73.75 each, shipped on the *San Ignacio de Loyola,* amounting to $7,786.25, and for 9 military officers at $215 each, shipped on the *Leon XIII,* amounting to $1,935, thus making an overpayment as above stated to the claimant company of $9,721.25, as aforesaid.

Wherefore the defendant, the United States, prays that judgment be entered against the claimant for the sums above set forth as overpayments made to the claimant company, viz:

(1)	$371,988.75
(2)	12,788.75
(3)	9,721.25
or the total sum of	$394,498.75

LOUIS A. PRADT,
Assistant Attorney-General.

34 No. 23,689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

IV.—*Replication by Petitioners to Counter-Claim on Behalf of the United States.*

Filed September 21, 1905.

Come now the petitioners herein by their Attorney of Record, and by way of Replication to the counter-claim heretofore filed by the defendants, state as follows:

First. That the petitioners herein are not indebted to the United States in the sum of $371,988.75, nor in any sum whatsoever, for moneys paid to the petitioners by the United States on account of the first five shipments of Spanish prisoners of War from the Philippine Islands, consisting of civil and military officials, enlisted men, minor children and others, in the vessels of the petitioner, sailing on the dates named in the first paragraph of said counter-claim; and said petitioners deny that said sum or any other sum has been paid to them or either of them on account of said shipments without au-

thority of law, or prior to the execution of any contract, express or implied, between the United States and the said petitioners.

On the contrary, said petitioners allege that said sum of $371,988.75, and all other amounts paid to them by the United States for or on account of the transportation of the Philippine
35 prisoners of War to Spain were justly and legally made to them in part payment and settlement of their account against the United States under the contract or contracts made for and on behalf of the United States by the Secretary of War with the said petitioners.

That the sums agreed to be paid for the services agreed to be rendered by said petitioners were reasonable and just; and there remains still due and unpaid by the United States to said petitioners, on account of said services rendered by them in conformity with the contracts legally made, the full sum of $293,246.25, as demanded in the amended petition heretofore filed herein.

Second. In Replication to the second counter-claim of the defendants, the petitioners state as follows:

That they are not indebted to the United States in the sum of $12,788.75, or any other sum, for moneys unlawfully paid to the claimant company by the United States for transportation of prisoners of War and others, shipped in the vessels of the claimant company from the Philippine Islands upon various dates, which said prisoners, it is alleged, were not landed in Spain. On the contrary, said petitioners allege that by the terms of the contracts made on behalf of the United States, with the petitioners herein, for the repatriation of the Philippine prisoners, it was agreed "that payment to the said company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship", and that
36 sum, so paid was lawfully paid to petitioners.

Third. By way of Replication to the third counter-claim of the defendants herein, the petitioners deny that they are indebted to the defendants in the sum of $9,721.25, for or on account of moneys overpaid to the petitioners on supplemental bills, No-. 22 and 23, and deny that the entire number of military officers and enlisted men shipped at Manila on the two vessels referred to in shipments No-. 22 and 23, were paid for by the Quartermaster's Department, or that the same was again allowed and paid by the accounting officers of the United States.

Wherefore, the petitioners, J. M. Ceballos and Company, pray that the several counter-claims of the United States hereinabove referred to be disallowed; that the said counter-claims be dismissed, and that the petitioners, the said J. M. Ceballos and Company, have the judgment of this Court for the sum of $293,246.25, as demanded in the amended petition heretofore filed herein.

JOHN J. HEMPHILL,
Atty. for Petrs.

SIDNEY C. NEALE,
EDWIN H. DUFF,
Of Counsel.

37 DISTRICT OF COLUMBIA, *City of Washington:*

Personally appeared John J. Hemphill, who being first duly sworn, deposes and says: That he is the Attorney of Record in this case, that he has carefully read the foregoing Replication, and that the statements therein set forth of his own knowledge are true, and those stated upon information and belief, he believes to be true.

JNO. J. HEMPHILL.

Subscribed and sworn to before me this 19th day of September, 1905.

[SEAL.] FRANK C. HALL,
Notary Public.

38 V.—*Findings of Fact, Conclusion of Law and Opinion of the Court.*

Filed April 22, 1907.

J. M. CEBALLOS & CO.
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

That Juan M. Ceballos, John S. Fiske, and Anderson C. Wilson compose the firm of J. M. Ceballos & Co., with their principal office at No. 27 William street, New York City, in the State of New York; said Juan M. Ceballos and John S. Fiske are citizens of the United States by birth, and said Anderson C. Wilson is a subject of Great Britain.

The members of the firm were the American operators and agents of the Compañía Transatlántica, a line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, and upon the vessels of which all the repatriated Spanish prisoners were transported from the Philippine Islands to Spain, or were undertaken to be transported.

Contract relations existed between the Government of Spain and the Compañía Transatlántica, beginning in 1887 and ending in 1907, and were in force at the outbreak of hostilities between Spain and the United States. In accordance with this contract and the general instructions under the same in relation to transportation, the Spanish Government had the right and the duty imposed upon it of carrying in the boats of the Compañía Transatlántica all active and licensed members of the army and navy, and all officials engaged in the civil possession of the States who should be sent to the provinces, to the colonial possessions, and to foreign ports, or who should be returning

from one or the other of these; those sentenced to penal establishments, or who returned from such establishments; the Sisters
39 of Charity, and the missionaries who traveled to one or the other of the Spanish territories; the exiled, the shipwrecked, and the poor who claimed the protection of the authorities, and the women and children and widows of the chiefs, officers of the army and navy, and of public officials, to whom there was required to be accorded the same service to which the head of the family was entitled.

The Compañía Transatlántica was ordered by the Spanish Government to repatriate all Spanish residents in the Philippines who, at the termination of the war, had to return to the peninsula, cooperating with the Government of the United States or the person or entity to whom the service for the transportation of prisoners should be awarded—the Spanish Government on its part guaranteeing the Compañía Transatlántica as the minimum price to be received for passages undertaken by the Compañía Transatlántica the amount arranged for according to the terms of the contract between the Government of Spain and said Compañía Transatlántica.

The Compañía Transatlántica sent to the Spanish Government its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit; and the sums for which suit is now brought against the United States herein have all been settled and paid by the Spanish Government to the Compañía Transatlántica in Spain. It does not appear that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is brought, or any of said balances, to said Compañía Transatlántica or th-t plaintiffs have incurred any liability therefor.

Ceballos & Co. were agents of the company's business for ordinary traffic between New York and ports in Spain, but their agency ceased at the breaking out of hostilities between the two countries.

When hostilities between the two countries ceased Ceballos & Co. made arrangements with the Compañía Transtalántica whereby the transportation of the Spanish prisoners of war contracted for with the United States Government was effected in the vessels of said Compañía Transatlántica, and the contracts hereinafter mentioned were made between the United States and Ceballos & Co. alone.

II.

The city of Manila surrendered the 13th of August, 1898, and August 14 the United States and Spanish authorities agreed upon written terms of capitulation, of which article 5 is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion, shall be referred to the Government of the United States at Washington."

III.

By the treaty of peace executed at Paris by representatives of Spain and the United States on December 10, 1898, it was stipulated in paragraph 1, article 5, that—

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in article 6, that—

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

IV.

There was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers and their families, and a much larger number of enlisted men, together with the wives and children of some of these enlisted men. Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time—all of them fed, guarded, and attended at the expense of the United States. Small-pox had been prevalent and infection was apprehended. The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had wives and children with them. There were besides a number of civilians, such as nurses, nuns, monks, friars, sisters of charity, and lady pensioners. The United States treated all of these classes as prisoners of war, and had supreme control of them after the surrender of Manila until they were delivered aboard plaintiff's ships for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted.

V.

General Otis, commanding the United States forces in Manila, considered that an emergency existed requiring immediate action, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but under an oral agreement with plaintiffs as hereinafter stated.

Bills for these shipments were rendered after the execution of the written contract.

41 VI.

In the emergency deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into an oral agreement with the petitioners under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport such of the Philippine prisoners as the United States desired to return to Spain, the price to be paid for such transportation to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into under the terms of a treaty of peace between the United States and Spain.

Under this oral agreement the petitioners immediately began furnishing vessels, and the transportation of the Philippine prisoners commenced by the first vessel in charge of plaintiffs which sailed from Manila November 7, 1898, and continued until another and a written contract was entered into for the transportation of those prisoners not transported under the oral agreement.

VII.

January 20, 1899, the Quartermaster-General of the Army advertised for bids for suitable vessels for the repatriation of the Spanish prisoners. Following is a copy of his advertisement:

"WAR DEPARTMENT,
"QUARTERMASTER-GENERAL'S OFFICE,
"WASHINGTON, D. C., *January 20th*, 1899.

"Transportation for Spanish Prisoners of War from the Philippine Islands to Spain.

"By direction of the Secretary of War, sealed proposals are invited for the transportation of the Spanish prisoners of war now in the Philippine Islands from Manila or such other ports in the Philippine Islands as may be most convenient for their embarkation to Cadiz or such other ports of Spain as may hereafter be designated. Their number is estimated as about 16,000 officers and enlisted men. Cabin accommodations are to be supplied for the officers and third-class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men.

"The United States Government will deliver the prisoners on board the vessels at Manila, or such other ports as may be designated for their embarkation. Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey. The subsistence to be equal to the United States 'garrison' rations, as follows. One thousand complete rations. Meat—Pork,

1-10, 75 pounds net weight; bacon, 2-10, 150 pounds net weight; tinned roast beef, 7-10, 700 net weight. Flour or hard-bread, net weight 1,000 pounds. Vegetables—Dried beans, net weight
42 75 pounds, or rye, net weight 50 pounds; fresh potatoes, net weight 800 pounds; onions, net weight 200 pounds. Coffee, roasted, net weight 80 pounds. Soap, net weight 40 pounds. Salt, net weight 40 pounds. Pepper, black, net weight 25 pounds.

"Proposals will state the number of vessels which are proposed to be used for the service; the name and classification of each; the tonnage capacity of each; their speed; the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage from Manila to the coast of Spain. Proposals will also state the time at which each vessel will arrive in the harbor of Manila and report to the chief quartermaster at that place ready for the embarkation of the prisoners of war. Vessels of any nationality may be tendered and will be considered for the service required. Payment for the service will be made when evidence is furnished that the ship has arrived with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the quartermaster is to determine the number to be paid for. Proposals should be addressed to the depot quartermaster, San Francisco, California, at which place they will be opened at 12 o'clock m., standard time, on the 1st day of February, 1889, and submitted to this office. The Government reserves the right to reject any and all proposals submitted.

"M. I. LUDINGTON,
"Quartermaster-General, U. S. Army."

VIII.

The petitioners, through R. A. C. Smith, their attorney-in-fact, submitted their bid, accompanied with the number and names of the vessels, etc., as required by the advertisement, which bid was accepted by the War Department and is as follows:

"SIR: In accordance with the advertisement of Gen. M. I. Ludington, Quartermaster-General, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañiá Transatlántica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

"It is proposed not to load the steamers beyond two-thirds of their steerage capacity. This is considered not only advisable as an act of

humanity, but absolutely necessary, owing to climatic conditions and length of voyage.

"I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

"The charge for this service is dependent on the ports of call in the Philippines and also on the quarantine regulations in
43 Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

"For each officer..... $215.00
"For each enlisted man..... 73.75

"It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

"I will furnish a satisfactory bond for the faithful fufillment of this service.

"Very respectfully, R. A. C. SMITH."

IX.

The bid of petitioners was accepted, and on March 4, 1899, the contract was put in writing and signed by Hon. R. A. Alger, Secretary of War, on behalf of the United States, and by J. M. Ceballos & Co., through R. A. C. Smith, attorney-in-fact, and is as follows:

"Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that

" 'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.'

"And in Article VI, which reads as follows:

" 'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

" 'Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

" 'The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the pro-

posal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States,

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the treaty of peace, referred to and quoted herein.

"The said J. M. Ceballos and Company hereby agree to furnish good and safe transportation for such number of prisoners of
44 war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war *and such other persons* as may be designated by the Secretary of War, *with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship;* that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform *the entire service as herein stipulated,* so that the embarkation of the last of the prisoners of war and other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the

United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

45 "No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

"In witness whereof we hereunto set our hands and seals this 4th day of March, A. D. 1899.

"(Sgd.) R. A. ALGER, [SEAL.]
"Sec'ty of War.
"J. M. CEBALLOS & CO., [SEAL.]
"By R. A. C. SMITH, *Attorney in Fact.*

"Witnesses:
"(Sgd.) G. D. H. HOPKINS,
"As to R. A. A.
" " L. F. RANDOLPH."

X.

In performing the obligations of their contract the petitioners supplied vessels with cabin accommodations and steerage accommodations, as had been agreed, and in the cabins were carried the officers, civil and military, with their respective families, and in the steerage the enlisted men and their families and other persons entitled to third-class passage. If any persons other than officers were given cabin accommodations the United States did not assign or place such persons in the steamers' cabins.

It does not appear from the evidence in the cause that the United States assigned or designated cabin accommodations for the commissioned officers or the wives and children of the commissioned officers. The evidence does establish to the satisfaction of the court that when the wives and children of the military and civil officers of the Spanish army in the Philippine Archipelago went on board the plaintiffs' vessels the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates.

XI.

For the first twenty-five shipments of prisoners of war from the Philippine Islands to Spain payment was made by the Government of the United States upon the certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, certified to be correct at the place of landing, showing the different classes of passengers; and payment was made for the total number of prisoners of war and other persons shipped at Manila, as shown by such certificates, regardless of the fact that many of those so shipped died or were left en route and were not landed in Spain.

XII.

The obligation of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war or political prisoners was questioned by the American Secretary of War.

46 On December 18, 1899, the Secretary of War addressed an official letter to the Attorney-General stating that under the terms of the treaty of peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the rates of compensation for the transportation of such persons were not set forth in the contract. But in that connection the Secretary requested an opinion as to the construction of the treaty of peace in regard to the scope of the description of Spanish prisoners, whether and to what extent the treaty included the repatriation of noncombatants at the cost of the United States. The Secretary further requested a construction of the contract rate of compensation which might be allowed and paid per capita for each class of persons charged for under the terms of the contract with Ceballos & Co. On January 6, 1900. The Attorney-General answered this official communication of the Secretary of War and construed the contract substantially as follows: That it was questionable whether all the persons tendered and transported were not within the purview of the treaty, but that this was a question for the United States authorities and not for the carrier who would have been guilty or might have been guilty of a breach of his contract in refusing to carry persons designated to be carried by the United States. The Attorney-General further informed the Secretary of War that the contract related to the transportation of prisoners; that as between the contracting parties it rested alone with the United States to say who it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract. That the words "other persons" were included within "enlisted men," and that as to all enlisted men and all persons other than officers, military and civil, $73.75, and no more, was payable by the United States to plaintiffs under the contract.

XIII.

The Comptroller of the Treasury concurred in the construction given to the contract by the Attorney-General.

XIV.

On January 19, 1900, the Secretary of War notified one of these plaintiffs that he had, on January 17, cabled General Otis at Manila that civil officials, prisoners' wives and children were entitled to passage to Spain, and that the contract provided for shipment of civil officials as officers on the basis of $215 per capita; that wives and children of officers, soldiers, and civil officials were entitled to transportation to Spain on the basis of $73.75 per capita. In this connection the Secretary of War notified J. M. Ceballos that "in the reports received from the commanding general in the Philippines as to the number of Spanish prisoners of war embarked upon the ships for transportation to Spain, the number of officers and soldiers only have been stated, and these do not correspond with the
47 number of those charged for in the bills of your company submitted to the Department. That "these reports covered seventeen shipments only" * * * and that "further payment upon the bills is deferred, awaiting receipt of report called for by the Department of November 27, 1899," relating to the number of passengers.

XV.

Of the last 15 shipments of prisoners of war, running from February 20, 1900, up to July 14, 1901, the list of passengers shipped, as shown by requests for transportation and quartermaster's requisitions (based on requests from the Spanish authorities) is as follows:

Military officers	164
Civil officials	28
Military officers' wives	29
Military officers' children (major)	35
Military officers' children (minor)	5
Enlisted men	1,560
Enlisted men's wives	9
Enlisted men's children (major)	6
Enlisted men's children (minor)	6
Civil officials' wives	13
Civil officials' children (major)	9
Civil officials' children (minor)	3
Civil Spanish subjects	11
Wives of civilians	3
Children of civilians (major)	8
Children of civilians (minor)	3
Monks	24
Priests	37
Civil lady pensioners	2
Major child of civil lady pensioner	1

Spanish subject, wife, and child	3
Child of telegraph operator (minor)	1
Child of civil lady pensioner (minor)	1
Total	1,971

Upon the above shipments the Auditor for the War Department made the following allowances:

Officers (which included civil officials of the class of military officers), 184, at $215 each.

Enlisted men and other persons, 1,589, at $73.75 each.

And disallowed payment for the following persons because not called for and not included in requests for transportation of the claimant company at the time of embarkation.

Military officers	5
Civil officials	3
Military officers' wives	0
Military officers' children (major)	7
Military officers' children (minor)	0
Enlisted men	61
Enlisted men's wives	9
Enlisted men's children (major)	6
Enlisted men's children (minor)	0
Civil officials' wives	4
Civil officials' children (major)	9
Civil officials' children (minor)	0
Civil Spanish subjects	11
Wives of civilians	3
Children of civilians (major)	8
48 Children of civilians (minor)	3
Monks	24
Priests	37
Civil lady pensioners	2
Major child of civil lady pensioner	1
Spanish subject, wife, and child	3
Child of telegraph operator (minor)	1
Child of civil lady pensioner	1
Total	198

Making 198 persons in all whose passages were not allowed for by the Auditor for the War Department for the reason that they were not included in requests for transportation.

If allowed for such service on the basis of $215 for each military and civil official, and $73.75 per capita for enlisted men and other persons, the amount due to plaintiffs on the said 198 persons would be $15,732.50.

The method of counting prisoners entitled to transportation under the contract was changed as to the last fifteen shipments so that requests for transportation with reference to available space should

be made upon the plaintiffs. Thereupon a requisition for transportation was issued by the United States quartermaster at Manila in words and figures following, to wit:

"HEADQUARTERS DEPARTMENT OF THE PACIFIC AND
"EIGHTH CORPS, U. S. ARMY,
"AYUNTAMIENTO, MANILA, *April* 10, 1900.

"J. M. Ceballos & Co.

"SIRS: Under articles of agreement dated February ——, A. D. 1899, between the Secretary of War and J. M. Ceballos & Co., you are requested to furnish transportation to the following Spanish prisoners from Manila, P. I., to Spain on steamship *Leon XIII:*

"Payment for this service will be made in Washington, D. C., U. S. A., at the office of the Quartermaster-General of the Army.

" 10 commissioned officers.
" 258 enlisted men.
" 3 civilian officials.
" 8 wives of officers and officials.
" 3 children under 3 years of age.
" 6 children 3 years to 10 years of age.
" 1 child over 10 years of age.
" Approved.
" By command of Major-Gen. E. S. Otis, U. S. V., military governor P. I.:

"C. P. MILLER,
"*Major and Quartermaster, U. S. A., Chief Quartermaster.*
"C. H. MURRAY,
"*Major and Inspector-Gen., U. S. V., Secretary.*"

Pursuant to the requisition of the Quartermaster-General all the men who were placed on the list of passengers for each shipment were required to be at a particular place at a certain time in the morning, and they were counted by an officer * * * of the Quartermaster's Department * * * and taken aboard launches and carried out to the Spanish vessel ready to sail; and as they went on board, the persons mentioned in the requisitions were
49 counted by another United States officer accompanied with the officer who represented the steamship company. Occasionally permission was given to officers of considerable rank to go aboard in their own conveyances, and these were checked off when they went aboard by an officer representing the Government and an officer representing the plaintiffs, and were thereby included in the numbers called for by the requisitions.

The 198 persons now claimed for were not included in the count at the time and place of embarkation.

No objections were offered at the time of the change in the method of computing the number of persons to go aboard by the plaintiffs.

The accounts presented to the Treasury for payment asked compensation for 198 persons, according to a certificate in form and figures following, to wit:

"BARCELONA, SPAIN, ...

"I certify that the following Spanish prisoners have been furnished transportation from Manila, P. I., to Spain by J. M. Ceballos and Co. on steamship *Leon XIII:*

"10 commissioned officers.
"259 enlisted men.
"5 civilian officials.
"8 wives of officers and officials.
"3 wives of enlisted men.
"2 children under 3 years of age.
"6 children 3 years to 10 years of age.
"2 children over 10 years of age.
"2 children of enlisted men under 3 years of age.
"4 children of enlisted men under 3 years to 10 years.
"5 children of enlisted men over 10 years.
"3 volunteers, 3d class.

"JAMES G. LAY,
"American Consul."

The foregoing form of requisition for transportation was used for fourteen other ships besides the steamship *Leon XIII,* but on different dates, according to time of sailings, and embraced officers, enlisted men, and other persons on which the count was made as set forth.

The evidence does not establish to the satisfaction of the court that these 198 persons certified to by the American consul at Barcelona were prisoners of war, entitled to transportation under the contract.

XVI.

The following sums have been paid to the claimant company for the transportation of prisoners of war, consisting of officers, enlisted men, and other persons, in the ships of the Compañía Transatlántica, between the 7th day of November, 1898, and the 14th day of July, 1901, embracing the following classes at the following amounts:

1,613	military officers, at $215	$346,795.00
405	military officers' wives, at $73.75	29,868.75
575	military officers' children (major), at $73.75	42,406.25
301	military officers' children (minor), at $36.875	11,099.375
15	minor children, at $73.75	1,106.25
338	civilian officials, at $215	72,670.00
78	civilians, at $73.75	5,752.50
50 157	civilian officials' wives, at $73.75	$11,578.75
187	civilian officials' children (major), at $73.75	13,791.25
94	civilian officials' children (minor), at $36.875	3,466.25
3	civilian officials' children (minor), at $73.75	221.25
13,583	enlisted men, at $73.75	1,001,746.25
19	enlisted men's wives, at $73.75	1,401.25
25	enlisted men's children (major), at $73.75	1,843.75
11	enlisted men's children (minor), at $36.875	405.625
6	enlisted men's children (minor), at $73.75	442.50
	Making total payment of	1,544,595.00

XVII.

The total number of prisoners of all classes delivered by the United States aboard ship for which there were quartermaster requisitions and transported by the petitioners, in accordance with their two contracts (one of which was oral and the other of which was in writing, and set forth herein), was 17,305—that is to say, 1,938 naval and military and civil officers and 15,367 enlisted men and other persons. The total amount due the petitioners for such service, upon the basis of $215 per capita for the 1,938 military and naval officers and $73.75 for each enlisted man and other person, is $1,549,986.25.

The total amount paid to the petitioners by the United States at various times and by sundry checks as part payment of this indebtedness (which amount includes the defendants' counterclaim of $9,721.25) is $1,544,595, as set forth in previous findings.

The balance due the petitioners by the United States for such service is $5,391.25.

XVIII.

In addition to the total number of prisoners of war and other persons delivered by the United States aboard ship at Manila and transported by the petitioners in accordance with their two contracts (one of which was oral and the other of which was in writing), which amounted to 17,305 passengers of all classes, there were carried in the same ships and at the same times, along with said prisoners of war and other persons transported on account of the United States Government, 6,481 passengers.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimants are entitled to judgment against the United States in the sum of five thousand three hundred and ninety-one dollars and twenty-five cents ($5,391.25).

Opinion.

HOWRY, *J.*, delivered the opinion of the court:

The subject-matter of this controversy is the expense involved in the repatriation of certain prisoners of war from the Philippine Islands succeeding the close of hostilities between this country and Spain. The issues arise on the demand of the plaintiffs, stating a total earned of $1,837,841 and claiming a balance amounting to $293,246.25 alleged to be due under two agreements, one
51 verbal and one in writing, on account of services alleged to have been performed by them for the repatriation of 17,527 persons.

The first thing to be considered relates to the action of the parties under the alleged parol agreement. Payments for large amounts were made without any written contract for the repatriation of those

prisoners whose presence was deemed specially undesirable. These payments cover the first five shipments and amount to a sum aggregating $371,988.75. Defendants deny the existence of any oral agreement, and allege that until the treaty was signed an authorized agreement was impossible for the reason that the authority for an agreement could only come from the treaty itself. Restitution of the amount of the expenditures under the alleged parol agreement is demanded by way of counterclaim.

On August 12, 1898, our Secretary of State and the French minister at Washington, acting for the Spanish Government, entered into a protocol for the cessation of hostilities between the United States and Spain, in which it was provided that "the United States will occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines." Manila surrendered the next day, and the authorities of the two Governments there agreed in writing that "all question relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion shall be referred to the Government of the United States at Washington." The prisoners were then estimated to number about 16,000, but an actual count subsequently increased the estimate to something over 17,000 persons.

No steps were taken immediately for any removal. But the necessity existed to bring about better conditions in the fallen city. The Spaniards themselves were perhaps anxious to go home, and it was understood by both sides that, under the terms of the capitulation, the military occupation of the United States was likely to be permanent. There was a large number of sick and wounded in the vicinity of Manila and elsewhere in the archipelago. These numbered more than 1,000 persons, and the persence of so many was a menace to the health of the place. Out of these conditions arose the actual transportation of a large number for which accounts were presented and paid and from which the first counterclaim has arisen.

It is proper at this point to notice plaintiffs' contention that by the action of the accounting officers, who approved the accounts, the defendants are precluded from disputing the correctness of the payments for the five shipments in dispute.

Jurisdiction to hear set-offs was conferred by an act approved March 30, 1868, which provides for revision of settlements (15 Stat. L., 54). This statute is now section 1061 of the Revised Statutes, which, in turn, was reenacted by the first section of the Tucker Act with respect to all set-offs on the part of the Government against any claimant in this court. There is no reason to discredit the set-off merely because the accounts were passed upon at the Treasury. True, the presumption is that the payments were lawfully made, and this presumption continues until the contrary appears. The fact
52 that the action of the accounting officers (who generally resolve every doubt in auditing public accounts in favor of the Government) is under consideration at the instance of the law officers of the Government in no wise diminishes the value of the

demand for restitution. Quite the contrary. The very object of the statute relating to the revision of settlements is to place the action of those most responsible for them under the watchful care of those whose duty it is to appear for the Government in the courts. The right to recover moneys illegally paid by a public officer exists in this court even without a counterclaim whenever it appears that the settlements are unlawful. (*Wisconsin Central R. R. Co. vs. U. S.*, 164 U. S., 190.)

The material inquiry, then, is the nature of the operations under which the first five shipments were made. We have carefully considered this phase of the matter because of its immediate bearing upon the claim for a large refund. As our findings are not the subject of review, their importance can not be overestimated.

The telegraphic correspondence between General Otis, commanding in the Philippines, and the Adjutant-General of the Army in Washington tends to rebut the idea of any parol agreement of the first shipments at the expense of the United States. But the commander there did not, so far as this evidence shows, know that Ceballos & Co. were in consultation with the Secretary of War here. The correspondence offered in evidence does not in itself disprove the allegation that negotiations were then going on at the seat of government for the removal of the sick from the Philippine Islands to Spain. It is historically true also that negotiations were in progress at the same time for the removal of the sick and wounded prisoners of war from Porto Rico and Cuba. But there was a special necessity to get the sick and wounded from the more distant conquered territory. The correspondence recognized these conditions for the relief of a state of affairs which was as well understood by the Government at home as by the commanding general on the spot.

Careful scrutiny compels us to say we are unable to see any actual inconsistency in the testimony relating to the occurrences here with respect to the initial shipments. It positively appears from the plaintiffs' testimony that an agreement was made with the Secretary of War. Neither the Secretary nor any civil or military authority of the Government in the War Office has ever made any denial of the direct testimony relating to the agreement. This agreement is proven by Ceballos & Co. as having been made in Washington with the Secretary of War. It is inferentially corroborated by the subsequent telegrams of the commanding general in the Philippines that in all instances the departure of the prisoners was urged and hastened. Finally, the Treasury officers were satisfied (by the response to their first objections) to make the payments for the shipments, and with the sufficiency of the agreement exhibited in the correspondence with the War Department in that connection. The findings establish the parol agreement between plaintiffs and the Secretary of War. The particulars are there set forth in the nature of a special verdict, which are believed by the court to substantially embody all that is material in the matter in dispute. Without multiplying words on this part of the case was pass to the question of the sufficiency of the agreement.

53 Government liability to pay anything under the parol agreement is denied by defendants because any contract, they say, with respect to the first five shipments was within section 3744 of the Revised Statutes, and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," can not be sued upon. Defendants cite *Clark v. United States,* 95 U. S. 539; *Saloman v. United States,* 19 Wall., 17; *South Boston Iron Co. v. Same,* 118 U. S., 42; 18 C. Cls. R., 165; *Lindsley's case,* 4 *id.,* 359; *Jones's case,* 11 *id.,* 733; *Steele's case,* 19 *id.,* 181.

But this is a completed agreement. The service was actually performed and defendants got the benefit of it. In a recent case in the Supreme Court—affirming this court—Mr. Justice Holmes said that if the United States, instead of paying for the subject-matter of the suit there had set up the invalidity of the contract, the claimant could still have sued on a *quantum valebat.* (*St. Louis Hay Co. v. United States,* 191 U. S., 163.) In that case the court cited the leading case of *Clark v. United States, supra,* with approval, where it was held that if a parol contract has been wholly or partially executed and performed on one side, the party performing will be entitled to recover the fair value of his property or service as upon an implied contract for a *quantum meruit.* An examination of these two cases we think authorized settlement of the right of plaintiffs to recover on whatever the services are shown to be worth.

But there is another aspect in which this part of the case may be viewed. It has appeared that by the terms of the capitulation the expenses of the repatriation were referred to the United States pending the treaty. This language did not make a contract, it is true, but it certainly threw the responsibility upon our Government to consider for itself the matter of expense in the intended removal of the captives. The situation of the prisoners and the small naval and military force of the United States among millions of natives made it very desirable for this Government to rid the islands of Spanish influences as quickly as possible. We have already adverted to the burdens imposed by the presence of the sick and wounded. Smallpox had been prevalent and there was fear of infection. The prisoners were as anxious to go as our authorities were to see them go, and it is reasonably certain that it was assumed (under the terms of the capitulation) by both Governments that the United States would bear the expense incident to repatriation when that question came to be considered. That it was to be considered is evident from the terms of the agreement of capitulation. Contracts for services made in emergencies and under exigencies need not always rest upon advertisements or be in writing. (Secs. 3709 and 3732, Rev. Stat.; *U. S. v. Speed,* 8 Wall., 77.) The state of affairs shown by the findings appear about as emergent as anything well could be, and the counterclaim on this point can not be sustained.

Independent of the statute authorizing parol agreements in cases of emergency, certain acts done in the exercise of the war power by public agents bind the Government to pay regardless of a contract in writing. "No one disputes the proposition," recently said one of the ablest constitutional lawyers in the country, "that when territory

is acquired by conquest the President, as Commander in Chief of the Army and Navy, may continue to hold and govern it through
54 the military authorities until such time as Congress can exercise its jurisdiction." The functions of any sort of government in conquered territory are to preserve order, protect the lives and property of the inhabitants, and preserve the interests of the conquering power until the constitutional authority of the proper civil agencies can be established by Congress upon the cession of the territory. The situation of the prisoners and the burdens imposed by the conditions to which we have adverted as existing there made it immediately desirable to provide for the prisoners elsewhere. A commander in the field, with prisoners on his hands, with no treaty to guide their disposition, could certainly incur reasonable expenditures incident to removal without the formalities of a written agreement. Actual necessity for quick action existed.

The Secretary of War could, of course, provide the same thing which a commander could direct. In legal contemplation the Secretary is an arm of the Executive. "The President speaks and acts through the heads of the several Departments in relation to subjects which appertain to their respective duties." (101 U. S., 770.) Anything the President may lawfully do the head of a Department may do in his name. So, unless public money is better protected than the safety and lives of inhabitants, and unless an army of occupation must be sacrificed to emergencies, the expenditures for the removal of sick and wounded captives was a proper charge against the Treasury independent of any contract, if the Secretary of War directed it, as we have found he did do.

We come now to the treaty of Paris of December 10, 1898, and the written contract under it.

The treaty provided: "The United States will, upon the signature of the present treaty, send back to Spain at its own cost the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces." Article VI provides that "the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines."

"The Government of the United States will at its own cost return to Spain, and the Government of Spain will at its own cost return to Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, the prisoners caused to be released, respectively, by them under this article."

When the treaty was promulgated, the Quartermaster-General advertised for bids for suitable vessels for the repatriation of the Spanish prisoners, estimating their number at 16,000. Plaintiffs submitted a bid for this contract, accompanied with the number and names of the vessels, which was accepted by the Secretary of War, and on March 4, 1899, a written agreement for the repatriation of the Spanish prisoners was executed by the Secretary and these plaintiffs. Under this contract the prisoners then on hand were transported, subsisted, and landed in Spain, except as hereinafter set forth. Under the terms of the contract the officers were to be repa-

triated on the basis of $215 for each officer and the enlisted men and other persons on the basis of $73.75 for each person.

Plaintiffs agreed for the purposes of the contract that they would provide a sufficient number of steamships for the safe and
55 comfortable transportation of prisoners of war and such other persons as might be designated by the Secretary, with cabin accommodations for all officers and third-class for steerage passengers, with ample gallery accommodations, space, and ventilation, for the enlisted men and other persons on board each ship, and that the subsistence furnished by the company should be equal in every respect to the army garrison rations. In consideration of faithful performance the Secretary of War agreed on behalf of the United States to pay to plaintiffs the contract price mentioned above, upon evidence that the officers, enlisted men, and other persons so designated were transported, subsisted, and delivered on shore in Spain.

Pending the execution of the treaty and the contract under it the obligation of this country to repatriate persons other than soldiers or political prisoners was questioned by the Secretary of State. Thereupon the Secretary of War requested construction of the law officers of the Government with regard to the repatriation of the families of the officers and of civil prisoners in the hands of the insurgents. The Secretary was advised by the Attorney-General that the provisions of the contract under the treaty embraced noncombatant prisoners as well as soldiers and all prisoners captured and held by the United States or held and released by the insurgents, whether their detention was originally voluntary as to them or otherwise. His opinion was that the United States had the right to adopt as against themselves as liberal a construction of the treaty as they chose, and that this Government would not have tolerated any such impertinence or delay as would have resulted in the contractors questioning the action of the Government, and that the contract when referred to the treaty was not *ultra vires* the Secretary of War. (23 Opin. Att'y Gen., 14.)

No questions were raised respecting the conduct of the Government in carrying out the treaty under the construction given by the Executive Departments. Nor did the accounting officers of the Treasury object to making the payments as the bills were presented. But it is now argued that it is open to grave question whether any obligation was imposed on the United States by the treaty of Paris or the contract under it to carry to Spain the civilians, the women and children, and other noncombatants, who could not properly be classed as prisoners of war.

The treaty provided that the United States would release all persons made prisoners of war by the American forces. Undoubtedly every Spaniard in the archipelago was considered a prisoner of war. Certainly no one of them could have left the islands without the permission of the commander of the American forces. The original terms of capitulation referred to this Government all questions relating to the repatriation of officers and men of the Spanish forces *and of their families* as well. Said the Attorney-General, the contractors had nothing to do with the construction given by this

Government as to what was to be done. Certainly they had no discretion except to transport all persons tendered by the United States aboard their ships. Plaintiffs were carriers only, without opportunity or power to determine who were entitled to transportation, and had they, as carriers, undertaken to decide that question for themselves they would have done so in violation of one of the
56 express provisions of the contract and at their own risk as for a breach. Any objection raised by the contractors as to the nature of the treaty would probably have resulted in stopping the business of embarkation. Whether the treaty obligation extended to the repatriation of monks, nuns, priests, sisters of charity, and the families of the officers and enlisted men, at the expense of this country, does not seem to us as now presenting material inquiry under the contract.

But the most important question is as to the price to be paid for persons other than commissioned officers and enlisted men who were treated as prisoners by the United States. Plaintiffs claim that the wives and children of all military and naval officers and of all civil officials, besides sundry cabin passengers, must be paid for at the rate of $215 for each person on all shipments. They undertake to support their contention by what they say were the views of the Secretary of War when the shipments were being made, from which it appears that as to certain noncombatants, which included wives and children of officers and soldiers and civil prisoners, the Secretary said that the obligation of the United States was not clearly defined in the treaty and that the rates of compensation for the transportation of such persons were not set forth in the contract. Plaintiffs urge that the United States should not now persuade its courts to adjudge the obligation of the treaty so that any part of the expense incident to repatriation should be borne by Spain. Defendants contend that the contract fixed the rate to be paid for the wives and children of the military, naval, and civil officers, as well as all persons other than officers, at a rate which must exclude all these other persons from the higher rate. They rely upon the construction given to the contract by the Attorney-General, who said that there were but two rates of price to be paid for the service, and that the lower rate covered each person other than an officer transported to Spain (23 Opin. Attorneys-General, 14).

It is true that the cost of transportation was not defined in the treaty, but the cause of action does not grow directly out of treaty stipulation, nor is the right to recover dependent upon any part of the treaty. If it were, the jurisdiction to proceed might be questioned under § 1066 of the Revised Statutes, unless the act of 1887, commonly known as the Tucker Act, repealed the earlier statute prohibiting the exercise of jurisdiction by this court in cases dependent entirely upon treaty stipulation. Without considering the treaty obligation we pass to the contract, because plaintiffs must stand upon that, as the proximate cause of action is the contract and not the treaty.

As to this contract, the Secretary of War did say that the rates

of compensation for the transportation of persons other than officers did not appear to be set forth.

But the Secretary was not undertaking to construe the contract, and whatsoever views were advanced by him were only incidental to inquiries propounded to the law officers of the Government when their advice was sought to determine his official action; for within a few days the Secretary of War notified one of these plaintiffs that civil officials and prisoners' wives and children were entitled to passage, but that the contract provided for shipment of
57 civil officials as officers at the higher rate, and the wives and children of officers, soldiers, and civil officials at the lower rate.

It is urged by plaintiffs that when they submitted their bid it was their expectation to make two classes of people and two classes of accommodation, and to receive two classes of payment for every person transported, whether a military or political prisoner, male or female; that the words "other persons" were used to designate classes and not "officers," or "soldiers" of the captured army; that the words as used in the contract are subject to interpretation in connection with other parts of the agreement, from which it is unreasonable to suppose that it was intended that women should be transported as steerage passengers.

The phrases "other persons," "persons," or "all other persons" occur seven times in the contract. The higher rate related to one class and the lower rate to another class, and within the second class the contract embraced priests, nuns, sisters of charity, all women and children and every other person designated within the term "prisoners" by the United States.

However proper it might seem that the families of the officers should have been given the same kind of accommodations as the officers themselves, plaintiffs can not narrow the meaning of the agreement by the restrictions which they now allege to have been their expectations—that only enlisted men were to go at the lower rate.

The fifth paragraph of the contract, being free from ambiguity, must control, unless there is something else in the contract, which, taking the agreement as a whole, operates to destroy the terms fixing the rates for the families of officers upon a different basis from the rates fixed for the officers themselv The advertising for bids called for cabin accommodations to b applied to the officers, and third class, or steerage accommodations, conforming to our regulations as to space, for enlisted men. The proposals were to state the price *per capita* for transporting officers and for transporting enlisted men and for their subsistence, and delivering them in Spain, accompanied by a guaranty that the prisoners would be comfortably cared for and subsisted while on the journey. Exactly why the advertisement for bids called for two classes instead of three classes does not appear. It does not appear that the proposal of plaintiffs to furnish the transportation conformed to the advertisement, because the proposal offered to perform at a price *"not to exceed* in any case $215 for each officer and $73.75 for each enlisted man."

Why the contracting parties still ignored the anomalous status of women and children, and other noncombatants, remains unexplained. But, though plaintiffs' bid was accepted by the United States, the contract in evidence was executed. By its terms the higher rate was applied to officers only and the lower rate "for each enlisted man, private soldier, *or other person.*" Thus, there is nothing in the agreement, and in the negotiations leading up to the agreement, which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals, and the acceptance of the same, came to be exactly defined by a written contract.

Undoubtedly both parties to the agreement expected the repatriation to include every person on the islands whom the United
58 States regarded as prisoners of war. For plaintiffs now to claim that a rate equivalent to that bid for commissioned officers should be applied to their families would seem unjust to the Government, because the logical conclusion arising from such a contention would be a full rate for every child occupying cabin accommodations as first-class passengers, contrary to the rules and customs governing the transportation of children across the seas at a lower rate than adults. Inasmuch as the rate was not to exceed the sums indicated in the proposals, it is clear that the way was left open for a lower rate than that called for by the advertisement and the proposals in question. It is equally clear that when the parties came to make a contract they agreed that two rates should govern, and it then devolved upon plaintiffs to provide such quarters as should be safe and comfortable for all. Plaintiffs can not now be heard to say that the accommodations for those carried at the lower rate were not safe and comfortable, and before they can collect the officers' rate for the persons not entitled to cabin accommodations they must show that defendants imposed upon them the obligation to furnish more than it contracted to furnish.

But this does not appear. The evidence does not establish that the United States had anything to do with the assignment of the quarters of the persons repatriated under the contract, but that these persons were merely delivered in Manila Bay to the plaintiffs' steamers to be counted and transported according to contract. Doubtless plaintiffs contracted upon the expectation of profit on the whole contract and got it. Whether they did or not find the contract profitable the court can not undertake to transpose the words "other persons" from the lower rate to the higher. The function of the court is not to make a contract for the parties.

The cause of action is on the express contract embracing all repatriations undertaken. There is nothing in the transactions of the parties outside of the express agreement to indicate that compensation for any service to be performed by plaintiffs was contemplated or that they could perform any service which should be paid for on a different basis than that expressed in the writing. There is therefore no room to invoke *quantum meruit.* As said in *Hartman v. United States* (40 C. Cls. R. 133), "the express written agreement

excludes the possibility of implied contract;" and that the minds of the parties met when they formulated their written agreement for the lower rate to include women and children seems clear from the prevailing conditions to be gathered from the official correspondence, which shows that early doubts existed as to who were to be regarded as prisoners. But the parties proceeded upon the as-umption that civil officials and women and children were to go and constructed their agreement accordingly. That this agreement was mutually satisfactory and profitable to both must be concluded from what the agreement itself shows and the circumstances under which it was made. Some doubts as to whether civil officials and women and children were to be regarded as prisoners at all entitled to transportation under the treaty must have been shared by the Government of Spain also, because we find that Government giving orders to its subsidized company under its contractual relations with that company to cooperate with plaintiffs in the premises. Spain apparently believed that this Government was doing what in any view of
59 the case it contracted to do under the treaty in providing for all classes in a safe and comfortable way, as no claim was then made upon this Government to do more. None could have been made under the treaty as to the kind of accommodations extended by the United States after it appeared that the accommodations provided were reasonably comfortable and safe. The repatriation of women and children alone involved an expenditure of several hundred thousand dollars by this Government, and as the matter stands it seems just for it to end.

Assuredly plaintiffs ought not to expect a judgment in their favor for the part paid by Spain to the Compania Transatlantica for coming into the matter to make more easy the journey to the peninsula for the women and children. In no event are plaintiffs entitled to anything for the service performed by others and paid for by Spain with neither compulsion nor request.

Under the construction we have given to this part of the agreement all children must be paid for at the uniform rate fixed for enlisted men and other persons. The amounts paid in settlement by some of the shipments were for minors at the rate of $36.87½ each. By these settlements it appears that two minor children were treated as one person. Plaintiffs are entitled to collect the round rate fixed for all persons other than officers as above stated, irrespective of the first settlements. These settlements had their origin in the presentation of accounts for transportation on those shipments made in advance of any written agreement under the treaty. The findings show that these accounts were presented on the five shipments pursuant to the oral agreement, and the question of compensation for those persons transported before the written contract was left open to be settled when the United States was prepared to ask for tenders. The first shipments were to be paid for on the written contract, which was expected to be made and which in point of fact was made. So, the written contract under the treaty fixed the rate payable for all persons transported under the oral agreement. Plaintiffs may have expected the written agreement to conform to their ideas of what should be paid for all the service, but as they entered into a

written contract which defined the rate there must be an application of the rate agreed upon for all persons repatriated.

Another question has arisen relating to the number transported on the last fifteen shipments. This dispute relates to the passages for 198 persons, some on the basis fixed for officers and some at the rate provided for the tranportation of enlisted men.

Masters of vessels certified to the landing of so many persons on many vessels, for which accounts were presented and paid without question. But this system was changed as to the last fifteen shipments, so that requests for transportation were required to be made and quartermasters' requisitions for transportation were certified to the carriers at the place of embarkation. No objections were offered at the time to the new method of computing the number of persons. The record does not disclose that any protest was offered at any time to the new plan. Plaintiffs now contend that unless the report of the American consul at Barcelona, in Spain (who must have obtained his information from the vessel masters as to the number landed at home), be accepted and paid for the carriers are hereby "made responsible for and held to perform the duty which the United
60 States had assumed in the treaty with Spain and which they had no power or authority to delegate "to others," thereby meaning that quartermasters' requisitions were an infringement on the rights of the carriers as measured by the treaty obligation.

But this obligation of the United States was to return at its own cost to Spain all prisoners released or caused to be released under the sixth article of the treaty. It nowhere appears that this obligation was violated. Neither does it appear that the United States demanded the transportation of persons outside of the requisitions. Secondly, it is objected that unless the report of the master of each vessel of the number landed at home be accepted the contract itself is violated. We do not think so. The contract provides that "an account of the number of officers, enlisted men, or other persons be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made on the basis of the number of officers and enlisted men and persons counted on each ship."

Unless the means adopted to secure the integrity of the count so operated as to cause the carriers to repatriate prisoners not covered by the quartermasters' requisitions the contract is not violated. The proof is insufficient to show that, either at the time of the promulgation of the new requirement or during the shipments under the requisitions, the carriers undertook to transport or actually transported more prisoners than the number contained in the requisitions. The burden of proof rests upon them to show that the account of the number landed across the water included "prisoners" in excess of the official count at the place of embarkation. The onus is equally upon plaintiffs to show that when the official account came to be taken at the time of embarkation of the persons classed as prisoners Ceballos & Co. were deprived of the right to verify the requisitions at the starting point. It is not to be supposed that plaintiffs would receive 198 persons on board not en-

titled to transportation—some chargeable at the rate of $215 and others at the rate of $73.75 each—and take action only by sending from Spain a list not covered by the requisitions at Manila. The Government was not bound to depend upon the master's statement of the number carried or upon the statement of some one in Spain as to the number who appeared to have been carried, because that provision of the contract which required the prisoners to be designatel at the time of embarkation afforded that measure of protection which the Government was entitled to have under the contract and which must govern the number designated as prisoners. Why should plaintiffs neglect at the place of embarkation and against their interest that provision of the agreement which authorized their representative to count the number designated for transportation? The count was to be taken at the time of embarkation and the place for the count was where the prisoners embarked. (The advertisement called for place while the contract designated time.) That was to insure the repatriation of prisoners only, which was the thing, apparently, which plaintiffs now seek to evade. The requisitions of quartermasters were merely the means employed to attain certain ends—that is, the requisitions were introduced to determine who were
61 entitled to transportation where both parties to the agreement could see that no imposition was made the one upon the other. There is nothing inconsistent in the means employed to secure the proper execution of the agreement. Certainly there is nothing unfair disclosed, and without something more definite in the way of proof to establish injury to plaintiffs the transportation of the 198 persons alleged to have been carried outside of the requisitions can not be charged to the United States. Especially is this rule proper in view of the fact that many persons were carried to Spain who were not properly classed as prisoners of war and did not claim to be.

For the transportation of 160 other prisoners embarked in the first twenty-five sailings and not landed in Spain defendants urge that the contract has been broken by plaintiffs; and inasmuch as these have been paid for, the Government wants restitution, and counterclaims to the extent of $12,788.75.

It appears that 118 of the prisoners died on the passage, and 42 stopped on the way. The contract provides for all transportation to be due and payable upon evidence that the officers, enlisted men, or other persons were transported, subsisted, and delivered on shore in Spain. The number of be paid for is fixed by that other paragraph in the agreement which provides for an account of the number of prisoners embarking. The findings show that when the prisoners were delivered on board, some were ill. The shipments included wounded as well as sick persons.

We do not think that another and different mode of payment than that fixed by the contract at the place of embarkation ought now to be insisted upon, unless plaintiffs are clearly in fault. It would seem unjust, after the parties have agreed upon one basis of computing payment, for the Government to claim settlement by another method not in conformity with that part of the contract, unless plaintiffs are themselves responsible for neglect in performing their part of the agreement.

The rule of travel upon the high seas is that when a person dies on the passage he shall be buried at sea, and by this rule plaintiffs ought to recover for the persons designated to be carried, but who died on the passage. There is no proof of any steamship line furnishing accommodations and undertaking to transport people abroad and refunding passage money for those who die on the way. There may be such a rule somewhere, but the Government has not undertaken to show it. Without knowledge of such a provision in the ordinary contract of transportation this court will not undertake to deprive plaintiffs of their expenditures in this behalf.

As to those persons who stopped on the way, we do not accept plaintiffs' contention that the prisoners were under the control of the United States after their delivery aboard ship. Neither is this contention necessary to maintain their claim in this respect. Having provided means for the transportation of all such prisoners as were tendered, it would seem unreasonable to hold that it is incumbent on plaintiffs to show that they failed to land these persons in Spain. When the prisoners went on board the vessels designated to carry them they were there pursuant to the agreement. The prisoners were no more under the control of plaintiffs, except as passengers, than under duress on the part of the United States. If,
62 without the permission of the carriers, these persons got off, plaintiffs should not be held responsible.

Certain amounts representing payments for officers and men in excess of the number actually transported on one of the ships is set forth by the defendants by way of counterclaim. The amount of refund demanded is $9,721.25. The contention on this item grows out of the certificates of the masters of the vessels and the certificate of the quartermaster in charge of transportation matters at the place of embarkation. The findings show the proper deductions on the counterclaim.

Summarizing the matters in dispute, we find that a preliminary agreement in parol for the transportation of sick and wounded prisoners of war was made between plaintiffs and defendants after the surrender of the Spanish forces in the Philippine Islands, but before any contract under the treaty was made, and the plaintiffs performed services under the agreement for which they were rightfully paid for the five initial shipments; that the matter of compensation for these five initial shipments was, by verbal agreement between the parties, to be fixed by subsequent written agreement under the treaty of peace; that the written agreement made after the promulgation of the treaty established a rate of compensation applicable to all shipments of $215 for each civil, naval, and military officer, and $73.75 for all shipments of enlisted men and every other person treated as a prisoner by the United States, and that under the finding in this behalf plaintiffs were properly paid the amounts received on the first five shipments.

The conclusion follows that the counterclaim of $371,988.75 must be rejected. Next, that under the written contract, plaintiffs are entitled to collect on the whole account $215 for each officer, civil and military, and $73.75 for each enlisted man and every other person

treated as prisoners and transported as such. There results to plaintiffs the right to collect the full rate fixed for enlisted men and others for each child delivered as a prisoner to plaintiffs for transportation. That as to 198 persons not covered by quartermaster's requisitions, but claimed by plaintiffs to have been carried to Spain, nothing can be paid to plaintiffs, because they were not properly designated as prisoners or treated by the parties at the place of embarkation as persons entitled to passage at the expense of the United States; that as to 118 prisoners who died on the passage and 42 who stopped on the way plaintiffs are entitled to collect the rates fixed by the written contract, because the said plaintiffs are not responsible for the failure to deliver these persons on shore in Spain after the Government had imposed that duty upon them by delivery of these persons to the plaintiffs' steamships. It follows from this conclusion that the second counterclaim of $12,778.75 must be rejected; that there was an overpayment for certain military officers and certain enlisted men, in excess of the number of officers and men actually transported, of $9,721.25, and as to this amount the defendant'- third counterclaim is sustained.

The total number of prisoners delivered aboard plaintiffs' ships which were designated according to the contract at the place of embarkation to be transported in accordance with the agreement was
17,305, of whom 1,938 were military and civil officers and
63 15,367 were enlisted men and other persons treated as prisoners of war by the United States. Plaintiffs have been paid under the parol agreement and the written contract $1,544,595. Deducting the amount of the third counterclaim and allowing for all naval, military, and civil officers at the highest rate named in the contract, and for all enlisted men and other persons at the lowest rate named therein, the total amount which plaintiffs are entitled to have for their services is $1,549,986.25. The net result found due and unpaid from the United States to the plaintiffs for all the services is $5,391.25, for which judgment will be entered.

BY THE COURT.

64 VI.—*Final Judgment of the Court.*

No. 23689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 22d day of April A. D., 1907, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find that the amount due the claimants in this case was $1,549,986.25, and that the aggregate amount paid the claimants by the United States, including the allowance to defendants on their third counter-claim, is $1,544,595.00; and that upon the whole case there is still due the claimants, a balance of $5,393.25, and it is therefore ordered, ad-

judged and decreed that the claimants—J. M. Ceballos and Company, do have and recover of and from the United States the sum of Five Thousand Three Hundred and Ninety-three Dollars and twenty-five cents ($5,393.25).

BY THE COURT.

65 VII.—*Application for, and Allowance of, Appeal.*

No. 23689.

J. M. CEBALLOS & CO.
vs.
THE UNITED STATES.

From the judgment and decree rendered in the above entitled cause on the 22nd day of April, 1907, the petitioners, J. M. Ceballos and Company, by their Attorney, on the 21st day of May, 1907, make application for and give notice of an appeal to the Supreme Court of the United States.

JNO. J. HEMPHILL,
Attorney for Petitioners.

Ordered: That the foregoing application for appeal be allowed as prayed for.

STANTON J. PEELLE,
Chief Justice.

May 21, 1907.

66 Court of Claims.

No. 23689.

J. M. CEBALLOS AND COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the Court; of the final judgment of the Court; of the application of the claimants for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I hereunto set my hand and affix the seal of said Court of Claims this 19 day of June A. D., 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 20,763. Court of Claims. Term No. 108. J. M. Ceballos and Company, appellants, *vs.* The United States. Filed June 19, 1907. File No. 20,763.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY,
Appellants,
vs.
THE UNITED STATES,
Appellee.
} No. 108.

APPEAL FROM THE COURT OF CLAIMS.

JOHN J. HEMPHILL,
Appellants' Attorney.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, *Appellants,*
vs.
THE UNITED STATES, *Appellee.*
No. 108.

APPEAL FROM THE COURT OF CLAIMS.

MOTION FOR ADDITIONAL FINDINGS BY THE COURT OF CLAIMS.

Come now the petitioners and move this Court for an order, as follows:

ORDERED: That the record in this case be remanded to the Court of Claims, and that said Court be instructed to find and certify to this Court, as matters of fact, in addition to the facts found and certified in said record—

First: Whether or not the United States entered into a contract with said J. M. Ceballos & Company, Appellants, for the repatriation of the Spanish prisoners of war held by

the United States in Cuba. If such contract was entered into, the said Court will insert a copy thereof in its Findings if the same appears in the record before said Court.

Second: Whether or not the families of Spanish officers taken as prisoners of war by the United States in Cuba were transported back to Spain by Ceballos & Company, the Appellants, and the rate at which said families, if so transported, were paid for by the United States.

Argument.

This case involves the liability of the United States to pay first class rates for first class accommodations furnished by the Appellants to the wives and children of civil and military officers, and other persons as prisoners of war in the Philippines and repatriated to Spain under a contract between the United States and Ceballos & Company, Appellants.

By the Treaty of Peace between the United States and Spain, made at Paris, December 10, 1898, it was stipulated in the first paragraph of Article 5 that:

> "The United States will, upon the signature of the present Treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in Article 6:

> " * * * The United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in *Cuba and the Philippines.*
>
> The Government of the United States will, at its

own cost, return to Spain * * * prisoners released or caused to be released by them, under this Article."

The United States entered into contracts with J. M. Ceballos & Company, the appellants, for the repatriation of the Cuban prisoners and of the Philippine prisoners held by the United States; both these contracts were made under and in accordance with the terms of the Treaty of Peace above quoted; the prisoners were repatriated from both countries in the vessels of the same company, those from Cuba being first carried back to Spain and payment made therefor by the United States. By reason of the large number of prisoners in the Philippine Islands taken and held by the United States authorities, and on account of the dreadful physical condition in which said prisoners were found when captured, and by reason of the disease and pestilence that prevailed amongst them, an emergency existed which required the United States to call upon Ceballos & Company for the repatriation of said Philippine prisiners before a formal contract could be advertised for and executed by the parties. A very large number of the prisoners were carried under these conditions.

When the testimony was being taken in this case the appellants introduced in evidence the Cuban contract and established by competent testimony the fact that the wives and children of officers were carried in the vessels of Ceballos & Company from Cuba to Spain as first class passengers and that the United States had allowed and paid for such transportation first class rates. In transporting the Philippine prisoners Ceballos & Co. again furnished first class accommodations for the wives and children of officers but in this case the United States has refused payment at first class rates and paid only third class, thereby entailing a heavy loss on appellants.

Appellants claim, and respectfully insist, that it is absolutely necessary for the full and proper presentation of their case on appeal that the Cuban contract and the rate of compensation allowed, and paid thereunder by the United States for the transportation of the wives and children of Spanish officers held as prisoners by the United States, should be embraced in the Findings of Fact and inserted in the Record on appeal.

A request for a Finding of both these important facts was made and filed with the Court of Claims at the proper time and in the regular way by the attorney for the petitioners and a reference made to the page of the Record (p. 247), where the Cuban contract is set out in full, and also to p. 37, where the rate paid by the United States for the transportation of the wives and children of Spanish officers under said contract is set out.

JOHN J. HEMPHILL,
Appellants' Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, APPELLANTS,
v.
THE UNITED STATES, APPELLEE.
No. 108.

SUGGESTIONS OF THE DEFENDANT IN OPPOSITION TO APPELLANTS' "MOTION FOR ADDITIONAL FINDINGS BY THE COURT OF CLAIMS."

The court is requested by appellants to remand the record in this case to the Court of Claims, and that said court be instructed in effect to make additional findings of fact. The defendant objects for the following reasons:

First. The record before this court fails to show that the appellants made any request to the Court of Claims to make the findings, or either of them, as set forth in their motion herein.

Second. The record fails to show that appellants filed any motion in the Court of Claims for a new trial, or that they made an application to said court to amend its findings or to make additional findings.

Third. The record fails to show due diligence on the part of appellants in filing the motion herein.

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Fourth. The additional findings which appellants seek to have the Court of Claims make and enter are immaterial to the consideration of the case by this court, and could have no bearing upon the final result.

ARGUMENT.

I.

Rules IV and V of this court relating to appeals from the Court of Claims read as follows:

> RULE IV. In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of fact and their conclusions of law therein, in open court, before or at the time they enter judgment in the case.
>
> RULE V. In every such case, each party, at such time before trial and in such form as the court may prescribe. shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact.

The object of the fifth rule is to enable "either party to call for a finding upon a special question deemed material to the judgment in the case." (*Mahan* v. *The United States*, 11 Wall., 109; *United States* v. *Driscoll*, 131 U. S., App. CLIX; s. c. Book 24, L. C. P. Co., p. 596.)

At the time, however, that the decision in each of the above cases was rendered rule five read as follows:

> In all such cases either party, on or before the hearing of the cause, may submit to the

> court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court. (See *Mahan* v. *The United States*, *supra*, 110, 111.)

In commenting upon the rule above quoted, Mr. Justice Miller in the Mahan case, among other things, said (p. 112):

> The rule does not say that if the Court of Claims refuses to find as prayed, the prayer and refusal must be made a part of the record. The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.

Assuming that the present rule 5 was intended to afford the same remedial purpose as former rule 5, the appellants here are not entitled to invoke it for the reason that they did not, so far as the record before the court shows, submit to the Court of Claims a request for the findings which they now ask this court to require of the Court of Claims.

II.

Opportunity is afforded to either party in the Court of Claims to file a motion for a new trial, and in regard to motion for a new trial rules 107, 108, and 109 read as follows:

> 107. A motion for a new trial, other than under Revised Statutes, section 1088, must be founded upon one or more of the following grounds: First, error of fact; second, error of law; and third, newly discovered evidence. It must be made at the term in which the judgment is rendered.
>
> 108. A motion founded upon an error of fact must specify with minuteness the fact or facts which are regarded as erroneously found or erroneously omitted to be found by the court, with full reference to the evidence which is relied on to support the motion.
>
> 109. A motion founded upon error of law must specify with like minuteness the points upon which the court is supposed to have erred, with references to the authorities relied upon to support the motion.

If the appellants felt themselves aggrieved by the failure of the Court of Claims to make the finding which is now requested, they had ample opportunity to present the matter, and not having done so, they should not now, without good cause, be permitted to bring the matter to this court.

III.

Final judgment was rendered by the Court of Claims April 22, 1907. (See Record, p. 51.) The printed transcript of the record was filed in this court June 19, 1907.

It is thus seen that the appellants have not used due diligence in the matter now complained of by them.

IV.

Appellants' claim was founded upon a contract in which they agreed "to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish them subsistence while en route and on board the ships, and to deliver them on shore in Spain." (See Record, pp. 17, 18.)

The findings which appellants now request the Court of Claims to make are in regard to an entirely different contract between the Government and appellants. It is not claimed in the motion that the two contracts are to be construed as one instrument or that either one is dependent upon the other.

Respectfully submitted.

JOHN Q. THOMPSON,
Assistant Attorney-General.

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THE UNITED STATES,

Appellee.

BRIEF FOR APPELLANTS.

[Attorney-General's Opinion Appended.]

WILLIAM V. ROWE,
JOHN J. HEMPHILL,
Of Counsel.

SULLIVAN & CROMWELL,
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The Evening Post Job Printing Office, 156 Fulton St., N. Y.

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No. 108.

J. M. CEBALLOS AND COMPANY,
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THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

Statement.

This case involves the construction of a contract between J. M. Ceballos and Company and the United States for the repatriation of the Philippine prisoners under the Treaty of Peace with Spain. The principal question involved is as to whether the United States shall pay first-class rates for the transportation of the "wives and children" of Spanish "officers," and other persons of equal rank, who were in fact returned to Spain by the appellants, in the steamship cabins, with such "officers," as first class passengers. The Government insists that third-class, or steerage, rates alone can be recovered.

Facts.

As matter of history, we know that, on August 12, 1898, Mr. Day, the Secretary of State, and Mr. Cambon, French minister at Washington, acting for the Spanish Government, entered into a protocol for the cessation of hostilities between the United States and Spain. Article 3 of this protocol is as follows:

> "The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines."

The city of Manila surrendered on the 13th of August, 1898, and on August 14th the United States and the Spanish authorities agreed upon written terms of capitulation, of which Article 5 is as follows:

> "All questions relating to the repatriation of officers and men of the Spanish forces *and of their families* and of the *expenses* which said repatriation may occasion, shall be referred to the Government of the United States at Washington" (Rec., p. 26).

By the treaty of peace executed at Paris by representatives of Spain and the United States December 10, 1898, it was stipulated in paragraph 1, Article 5, that—

> "The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish *soldiers* taken as prisoners of war on the capture of Manilla by the American forces"—

and in Article 6, that—

> "Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the in-

surrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, *the United States* will release *all persons* made *prisoners of war* by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"*The Government of the United States will, at its own cost, return to Spain*, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, *prisoners released* or caused to be released by them, respectively, *under this article*" (Rec., pp. 26–27).

The Court of Claims found that—

"there was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men. Many of these were in a pitiable condition physically, *exhausted with exposure and disease—1,200 being sick at one time*—all of them fed, guarded, and attended at the expense of the United States. *Small-pox had been prevalent and infection was apprehended.* The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had *wives and children* with them. There were besides a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity, and lady pensioners. The United States treated all of these classes as prisoners of war*, and had *supreme control* of them after the surrender of Manila *until they were delivered aboard plaintiffs' ships* for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted" (Finding IV; Rec., p. 27).

The Court below also found that, in the then-existing "emergency," the appellants undertook,

under an *oral* agreement with the Government, the immediate return of these "prisoners of war," thus described, and for a period of *four months*, ranging from November 7, 1898, to March 4, 1899, continued to furnish such transportation, until the execution, on the latter date, of a formal written contract providing in detail therefor. The findings are as follows:

> "General Otis, commanding the United States forces in Manila, considered that *an emergency existed requiring immediate action*, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but *under an oral agreement with plaintiffs as hereinafter stated.* Bills for these shipments were rendered after the execution of the written contract.
>
> "In the *emergency* deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, *entered into an oral agreement* with the petitioners under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport *such of the Philippine prisoners as the United States desired to return to Spain*, the price to be paid for such transportation *to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into* under the terms of a treaty of peace between the United States and Spain.
>
> "*Under this oral agreement* the petitioners immediately began furnishing vessels, and the transportation of the Philippine prisoners commenced by the first vessel in charge of plaintiffs which sailed from Manila November 7, 1898, and *continued until another and a written contract* was entered into for the

transportation of those prisoners not transported under the oral agreement" (Findings V and VI; Rec., pp. 27–28).

On January 20, 1899, the Quartermaster-General of the Army advertised for bids for suitable vessels for the repatriation of the Spanish prisoners.

The petitioners submitted their bid in regular form, which, as the Court found (Rec., pp. 28-29)—

> "was accepted, and on March 4, 1899, the contract was put in writing and signed by Hon. R. A. Alger, Secretary of War, on behalf of the United States, and by J. M. Ceballos & Co., through R. A. C. Smith, attorney-in-fact" (Rec., p. 30).

The written Philippines contract is as follows:

> "Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V, that
>
> "'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish *soldiers* taken as prisoners of war on the capture of Manila by the American forces.'
>
> "And in Article VI, which reads as follows:
>
> "'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.
>
> "'Reciprocally, the United States will *release all persons* made *prisoners of war*, by the American forces, and will undertake to obtain the release of all Spansh prisoners in the hands of the insurgents in Cuba and the Philippines.
>
> "'*The Government of the United States will, at its own cost, return to Spain*, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico,

and the Philippines, according to the situation of their respective homes, *prisoners released* or caused to be released by them, respectively, *under this article.*'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States,

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the Secretary of War and the said J. M. Ceballos and Company, *for the transportation of the said prisoners of war*, from the Philippine Islands to Spain, *as are designated in the terms of the treaty of peace, referred to and quoted herein.*

"The said J. M. Ceballos and Company hereby agree to furnish *good and safe transportation* for such number of *prisoners of war* AND *persons as may be designated by the Secretary of War*, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the *safe and comfortable* transportation of the *prisoners of war* AND *such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men* AND *other persons on board each ship*; that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the *prisoners of war* AND *other*

persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos and Company, for the transportation, subsistence, and delivery on shore of *each commissioned officer*, the sum of *two hundred and fifteen dollars* ($215.00), and for *each enlisted man, private soldier*, OR *other person designated by the Secretary of War for transportation* the sum of *seventy-three dollars and seventy five cents* ($73.75), the said sums to be due and payable upon evidence that said *officers, enlisted men*, OR *persons* have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the *prisoners of war* AND *all other persons to be transported* shall be *delivered by the United States on board the ships* at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and forty cents for each enlisted man per day. An account of the number of *officers, enlisted men*, OR *other persons* to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made upon the basis of the number of *officers, enlisted men*, AND *persons* counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and

should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

"No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

"In witness whereof we hereunto set our hands and seals this 4th day of March, A. D. 1899.

"(S'g'd) R. A. ALGER, [SEAL.]
Sec'l'y of War.
"J. M. CEBALLOS & Co., [SEAL.]
"By R. A. C. SMITH,
"*Attorney in Fact.*

"Witnesses:
"(S'g'd) G. D. H. HOPKINS,
"*As to R. A. A.*
" " L. F. RANDOLPH."
(Rec., pp. 30–32.)

The Court also found that, in performing the obligations of their contract—which, as we have seen, included both the *oral* agreement, *under which transportation service for four months was furnished*, and the formal written contract, under which the balance of such service was rendered—the appellants actually carried in the *cabins* the "*officers*, civil and military, *with* their *respective families*." In the steerage, the Court also found, the appellants carried the "enlisted men and their *families* AND *other persons* ENTITLED *to third-class passage*." It will be remembered that the only "other persons" so "*entitled*" were, *not* the "*prisoners of war*," *but* the "other persons *designated by the Secretary of War for transportation*" (Rec., p. 31—next to last par.).

The finding reads as follows:

"*In performing the obligations of their contract* the petitioners supplied vessels with

> cabin accommodations and steerage accommodations, as had been agreed, and *in the cabins* were carried the *officers*, civil and military, *with their respective families*, and in the steerage the enlisted men and their families AND *other persons entitled to third class passage*" (Rec., p. 32).

The total number of persons transported in the vessels provided by Ceballos & Co. as claimed by them, was 17,527; of whom 3,860 were transported as first-class or cabin passengers and 13,667 were transported as third-class or steerage (Rec. p. 19). This includes 198 persons not paid for by the War Department, and alleged by defendant not to have been embraced in certain requisitions, although actually transported, as shown by the certificate of the American Consul at the port of landing (Rec., p. 36, bottom—37).

The Court found (Rec., p. 38) that the total number of prisoners of all classes delivered by the United States aboard ship (for which there were quartermaster requisitions), and transported by the appellants, was 17,305—that is, 1,938 naval and military and civil *officers* and 15,367 enlisted men and other persons. The Court does not find the numbers of the wives and children of officers and other persons carried as first-class passengers, but includes them all under the head of "other persons," along with the "enlisted men," who were transported in the steerage. The Court apparently found the above number of 17,305 by deducting from the 17,527, claimed by petitioners, 24 persons alleged to have been counted twice and the 198 persons, actually transported, but alleged not to have been included in certain requisitions by the quartermaster at Manila.

The total amount claimed by the petitioners and appellants for the transportation furnished under their contract is $1,837,841.25 (Rec., pp. 19-20), of which they have been paid $1,544,595 (Rec., p. 37), and they asked judgment for the balance, amounting to $293,246.25 (Rec., pp. 20-21).

In the Court below, at the request of the Court, the Government admitted that if "wives and children" were to be carried at *cabin* rates, then the appellants were entitled to judgment, on that branch of their claim, in the sum of $262,468.25.

The Cuban Contract.

Previously, the appellants had agreed to transport, and had successfully carried to Spain, the *Cuban* prisoners. In this way, therefore, through this transportation service provided by the appellants, the United States was enabled, in fulfilment of its treaty obligation to the Spanish Government, to return to Spain, "at its own cost," "all persons made prisoners of war by the American forces." *For this single transaction and service,*—the return of all such Spanish prisoners by the United States—it merely happened that *three contracts with the appellants* were required—first, the *written Cuban* contract, *secondly*, the *oral Philippines* agreement, and thirdly, the *written Philippines* contract.

In view of our motion for additional findings, the determination of which was postponed until the hearing on the merits, we append hereto, for the convenience and information of the Court, a copy of the Cuban contract and a brief statement concerning the accommodations furnished to "wives and children" of "officers" thereunder and the compensation paid therefor. It should be said that all of these matters were parts of the same general transaction—the return of Spanish prisoners—were before the Court below, were used by both parties upon the argument below, and are matters of record and of general and familiar history—within the judicial cognizance of this Court—which, in the interests of justice, should be here considered.

The Cuban contract was as follows:

> "Sealed proposals having been invited for the transportation of the Spanish prisoners of war who surrendered to the United States forces in Cuba, from Santiago de Cuba to

Cadiz, or such port of same as might thereafter be designated, and the proposal submitted by J. M. Ceballos & Company, of New York, having been duly accepted.

"It is hereby, on this twenty-first day of July, 1898, agreed by and between the Secretary of War of the United States and said J. M. Ceballos & Company, that said company shall transport well and safely *all of the troops of Spain that were surrendered* by General Toral to the Army of the United States in Cuba, in the capitulation entered into by him at Santiago de Cuba, from said Santiago to such port in Spain as the Secretary of War of the United States may designate, and that the Government of the United States will pay for such transportation, and for the subsistence and delivery on shore of *the prisoners*, the sum of twenty dollars ($20) for *each enlisted man or private soldier*, and the sum of fifty-five dollars ($55) for *each officer* so delivered.

"The said company further stipulates that said subsistence furnished by the company shall be equal to United States Army garrison rations; that *cabin* accommodations are to be supplied for the said *officers*, and third-class or *steerage* accommodations, having suitable galley accommodations with ample space and ventilation, for the *enlisted men or privates;* that for the purpose aforesaid it will have at Santiago de Cuba within seventeen (17) calendar days from this day (that is to say, on or before the seventh day of the month now next following) seven (7) steam vessels with a total capacity for the conveyance of at least ten thousand (10,000) prisoners in conformity with the foregoing stipulations, and ready to take them on board and proceed immediately to Spain; and the remaining vessels, in number and capacity as the Secretary of War may notify the company, within twenty-one (21) days from the date of such notice.

"The Secretary of War stipulates that the United States will give safe conduct as against the Army and Navy of the United States to the vessels of the company engaged in the business aforesaid while proceeding to Santiago and from there to Spain, such safe con-

duct not to apply to ships already seized or in blockaded ports, and the ships employed as aforesaid to have only such armament as is customarily carried by merchant ships. Such safe conduct is to extend to foreign West Indian, Cuban and Spanish ports and to remain in effect until the prisoners are unloaded in a Spanish port designated, and is expressly made applicable to steamers of the Spanish Transatlantic Line, under the Spanish flag.

"For the better security of such safe conduct a document in the following form and duly signed will be furnished to the company for each ship, which shall be exhibited on demand, together with a copy of this contract, to any officer of the Army or Navy of the United States visiting the vessel:

"The President of the United States to all whom it may concern, greeting: This is to certify that the ——— is employed under contract with the Government of the United States in the business of transporting from Santiago de Cuba to a port in Spain Spanish prisoners heretofore surrendered to the Army of the United States in Cuba; that the Government of the United States has guaranteed safe conduct for this purpose to the ——— in going to and from Santiago de Cuba and until the disembarking of said prisoners in a Spanish port.

'All persons under the jurisdiction of the United States are required to respect such guantee.

'———— ————.'

"The company further stipulates that it will furnish the bond of ———— for the proper and faithful performance of this contract.

"The Secretary of War agrees that *the United States will deliver the prisoners aforesaid on board* at Santiago within a reasonable time after the vessels are ready, and to the number of at least ten thousand (10,000) *men* five hundred (500) *officers*, and that the payment of the said twenty ($20.00) dollars and fifty-five ($55.00) dollars for *each man and officer* to the numbers last aforesaid shall be made when satisfactory evidence that the prisoners have been transported and delivered

in accordance with this contract is presented to him.

"Witness our hands and seals this twenty-first day of July, 1898.

"R. A. ALGER,
"*Secy. of War.*
"J. M. CEBALLOS & Co."

Under this *Cuban* contract, the *United States actually paid* for "*wives and children*" of "*officers,*" all of whom were carried in the *cabins, the full cabin rates. No doubt or question on the subject was ever raised.*

Specification of Errors.

1st. The Court erred in holding that the "wives and children" of Spanish "officers," civil and military, and other non combatants, such as priests, nuns, sisters of charity and lady pensioners, although actually "treated" by the United States authorities "as prisoners of war" (Finding IV, Rec., p. 27), were nevertheless embraced in that class described in the contract as "other persons designated by the Secretary of War for transportation," and that they were, therefore, to be paid for at the third-class rate specified in the contract, to wit: $73.75.

2d. The Court erred in holding that the wives and children of the Spanish military and civil officers, the nuns, priests, sisters of charity and other like persons, being in fact prisoners of war, as found by the Court (Finding IV), were not properly and legally to be classed as "prisoners of war," and, therefore, to be paid for at the first-class rate specified in the contract, to-wit: $215.00, when they in fact enjoyed first-class accommodationsaboard ship.

3d. The Court erred in holding that the wives and children of Spanish officers, civil and military, and other non-combatant prisoners of war, although

transported as first-class passengers and afforded cabin accommodations aboard ship, were to be paid for at the third-class rate specified in the contract, to-wit: $73.75.

4th. The Court erred in holding that the Appellants, Ceballos & Company, were not entitled to be paid for the 198 persons actually carried in the last fifteen sailings of ships, on the allegation that they were not covered by the Quartermaster's requisition, although said persons were actually transported and delivered in Spain in accordance with the provisions of the contract.

5th. The Court erred in holding that the balance due to the petitioners by the United States for the service rendered under the contract sued upon in this case is $5,391.25, whereas the Court should have found that the balance actually due is $293,246.25.

POINTS.

FIRST POINT.

It was clearly the intention of the parties to provide for the transportation from the Philippine Islands to Spain of two distinct classes—first, of all Spanish "prisoners of war," "AND," secondly, of "such other persons as may be designated by the Secretary of War."

"Wives and children" were "treated" by both parties throughout "as prisoners of war," and not as "such other persons," within the description of the contract.

It is also equally clear that it was the intention of the parties that the "wives and children" in question should have precisely the same accommodations and be transported at the same rates as those provided for their husbands and fathers, who are classed as "officers," and the words of the contract must be so construed as to effectuate such intention.

On this point, the practical construction to this effect, placed by the parties upon the identical terms of the Cuban contract in this behalf—a contract between the same parties, concerning the same general transaction and subject-matter—and also upon the original oral Philippines agreement, is absolutely conclusive.

The Court of Claims, therefore, erred in sustaining the Government's contention, and classing officers' "wives and children" as "such other persons," who were entitled to only steerage accommodations, at third-class rates.

I.

The Controlling Principles of Construction.

In the interpretation of this instrument, the Court is required to examine the contract as a whole, to place itself in the situation of the parties at the time, and, in the light of the relations of the parties and the surrounding circumstances, to give to the special words of the contract such a construction as

will carry out the manifest general intention of the parties, and will accord with their own *practical* interpretation. The language of the contract must, if necessary, be subordinated to its manifest reason and purpose, and, of two possible constructions, the one just and equitable and the other working out an unjust and unconscionable result, the former must prevail. If the language be that of one party to the contract (here the United States), any doubt as to its construction must be conclusively resolved against that party.

These familiar and fundamental rules, when applied to the construction of the contract in the case at bar, are conclusive. Notwithstanding the fact that they are matters of every-day debate and application in this Court, their importance, in any consideration of the case at bar, will justify a brief reference to the expressions of the Court on the general subject.

It is, of course, well-settled that the United States, in contracting with its citizens, is controlled by, and that the Court of Claims and this Court are required to apply, precisely the same principles that govern in ordinary controversies between individual citizens. As this Court has said:

> "We hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals."
>
> *Smoot's Case*, 15 Wall., 36, at p. 47.

Again:

> "The United States when they contract with their citizens are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."
>
> *U. S.* v. *Bostwick*, 94 U. S., at p. 66.

This contract, based upon the proposals of the Quartermaster-General's office (Finding VII, Rec., p. 28), was *a Government contract, drawn, in ac-*

cordance with its custom in such cases, by the Government itself. Its language, therefore, must be *construed most strongly against the Government.* As this Court has said, speaking of such a contract with the United States, drawn by an army officer as its representative, and therefore to be *construed against the Government:*

> "Its doubtful expressions should, therefore, according to a well-known rule, be *construed most strongly against the party who uses the language.*"
>
> *Garrison* vs. *U. S.*, 7 Wall., 688, 690.

In such a case, the construction must be most "favorable" to the other party.

Noonan v. *Bradley*, 9 Wall., 394, 407.

As to the other general principles involved, the Court has said:

> "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."
>
> *Merriam* vs. *U. S.*, 107 U. S., 437, at p. 441.

In *O'Brien* vs. *Miller*, 168 U. S., 287, at p. 297, this Court said:

> "But the question presented involves *not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract.* The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion

> of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. *The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them.*"

That case, like the case at bar, involved the extension of a single word of the contract to cover a larger and different subject-matter. A bottomry bond was made void, under its defeasance clause, in case of the "utter loss of the *said vessel*." The bond, however, referred to a transaction between the parties in which *two vessels* were involved. In holding that the words of the bond referred to *both* —that is, the loss of either of the two—this Court said:

> "Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible, in reason, to construe the word 'vessel' in the defeasance clause as not applying to *both* the *Johnson* and the *Leslie*."

In *Scott* vs. *United States*, 12 Wall. 443, Scott had contracted to furnish *all* the transportation the United States might require between Little Rock and Fort Smith. This Court, in holding that the contract did not require the United States to unload cargoes coming up the river from points below to Little Rock, in order to give Scott the transportation of such cargoes to Fort Smith, said (at pp. 444–5):

> "In cases like this *it is the duty of the Court to assume the standpoint occupied by*

> *the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning.* It must have been known to both Scott and the quartermaster that such transportation would be required as that under consideration. It is incredible that they intended to subject the United States to the delay, inconvenience and expense of the unlivery and reloading of every cargo which came up the river to Little Rock only to feed Scott's contract and meet its demands. * * * *A proposition, from which flow consequences so unreasonable, must itself be regarded as of that character.*"

In *Bradley* vs. *Washington Packet Co.*, 13 Pet. 89, the defendant hired the ship "F." until the ship "S." should be "placed on the route to Potomac Creek." In plaintiff's suit for the hire, the defendant was allowed to show that both parties knew that the ship was intended for the transportation of mails on the Potomac, and that navigation on the river was interrupted by ice at certain periods, during which time the mails were conveyed by land. The defendant contended that, construed in the light of these circumstances, the contract did not require him to pay for the periods of closed navigation, although the contract itself was silent on the subject. In holding the evidence to be material, this Court said (at pp. 90-100):

> "We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and, in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject matter."

And this Court has also said:

> "When an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."
>
> *Noonan* vs. *Bradley*, 9 Wall., 394, 407.

So it has been well said that—

> "Where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract, and the other an unconscionable one, the former construction should prevail."
>
> *Coghlan* vs. *Stetson*, 19 Fed. Rep., 727, 729.

It is likewise well-settled that there is no difference between the rules applicable to the construction of contracts and those controlling in the case of statutes. Both statutes and contracts must receive a just and sensible construction, which will effectuate their spirit and intent, and work out reasonable results and avoid absurd consequences. As this Court has said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."
>
> *Trinity Church* vs. *U. S.*, 143 U. S., 461.

And—

> "It is a recognized rule in the construction of statutes, that '*a thing which is within the intention of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers.*' *This proposition is equally applicable to other*

> *written instruments.* The object of all symbols is to convey the meaning of those who use them, and, when that can be ascertained, it is conclusive. *The intent of the law makers is the law, and here the intent of the parties is the contract.*"
>
> *Insurance Company* vs. *Gridley*, 100 U. S., 614, 615-16.

In arriving at the intention of the law makers (and, of course, the same rule must hold in a search for the intention of contracting parties), words having a special meaning, where the reason and spirit of the statute or instrument are general, must be interpreted in accordance with the general purpose.

In *Beawfage's* case, 10 Coke, 99*b*, 101*b*, the familiar rule is thus stated:

> "*Quando verba statuti sunt specialia, ratio autem generalis, statutum generaliter est intelligendum.*"

As the interpretation of the special designation, "officers," to include "wives and children," involves, to some extent, an application of these rules in the construction of the contract in question, further illustrations of their repeated application by this court and other courts of authority, even in cases of statutory construction, may be enlightening.

In *Walnut* vs. *Wade*, 103 U. S., 683, this Court limited the word "inhabitants" in a statute to "legal voters," because the sense and reason of the situation required it, saying (at p. 694):

> "The act, it is true, requires the approval of the 'inhabitants' of the town; in its broadest sense this would include all sexes, ages and conditions. To require such approval by a vote of the 'inhabitants,' in this sense, would be an *absurdity*. The act itself is its own interpreter and shows that this is not its meaning."

In *Winslow* vs. *Kimball*, 25 Maine, 493, a statute peclared void all bequests made to a "*subscribing*

witness." The Court held that, notwithstanding the fact that the words of the statute, taken in their *literal* signification, required a *contrary* conclusion, it must be held, in the light of the remedy intended to be afforded and the mischief to be cured, that a bequest to the "*husband*" of a subscribing witness was included within the *reason* and *spirit* of the statute, and was void.

In *Eshleman's Appeal*, 74 Penn. St., 42, the Court held that, under a statute defining an advancement as a gift from a "parent" to a "*child*," a gift to a "*grandchild*" must be deemed such an advancement, because otherwise the purpose of the statute would be defeated.

So in *Crane* vs. *Alling*, 14 N. J. Law, 593, a statute providing for the continuance of suits by the executor or administrator of a deceased party was held, notwithstanding the narrowness and limitation of its terms, to include within its spirit and intent an administrator *de bonis non.*

In *Queen* vs. *Collingwood*, 12 Ad. & El. (N. S.), 681, a statute providing for a bastardy-order in the case of a *single woman*, was held, in the light of its spirit and purpose, clearly to apply to the case of a *married woman.*

So the Circuit Court of Appeals for the Eighth Circuit, in construing a general statute providing for the cutting of dead timber on certain timber preserves, held that it must mean only such timber as a prudent owner would cut to prevent further deterioration, on the ground that an acceptance of the literal meaning of the words would cause a useless waste, which Congress could never have intended.

U. S. vs. *Pine River Logging Co.*, 89 Fed. Rep., 907 (C. C. A., 8th Circuit).

In construing the limited liability statute, making it unlawful for *railroad corporations* to limit their liability to employees for negligence, the Circuit Court of Appeals for the Sixth Circuit held that, in view of the intent and purpose of the law, it was

plainly applicable to *receivers* of railways. Mr. Justice HARLAN, writing for the Court, said:

> *"To hold otherwise would be to subordinate the reason of the law altogether to its letter."*
>
> *Pierce* vs. *Van Dusen*, 78 Fed. Rep., 693, 696 (C. C. A., 6th Circuit).

In view of the fact that, in the framing of the Philippines contract, the parties must have been governed by their practice and experience under the previous completed contract for the repatriation of the *Cuban* prisoners, which was *between the same parties* (and which contained the same general terms and special designations—except the words "other persons who may be designated by the Secretary of War," which, as we shall see, were inserted in an entirely different connection and for another purpose in the Philippines contract—and *under which the "wives and children" of "officers" were carried with them in the cabins and paid for by the United States at first-class rates*), we must bear in mind the rule of *practical construction* so frequently and effectively applied in this Court, because, as the Court well knows, the "return to Spain" of "all persons made prisoners of war" was, under the terms of Article VI of the Treaty of Peace, *a single transaction* carried through in the performance of the single obligation thus created. It was merely an accident that, as it happened, two separate contracts were made, the one for Cuba and the other for the Philippines.

In *Insurance Co.* vs. *Dutcher*, 95 U. S., 269, this Court, in holding that a policyholder, notwithstanding the terms of his policy, was entitled to a paid-up policy without having paid premium notes which he had previously delivered to the insurance company, gave full and conclusive effect to the established fact that the company had *previously*

issued paid-up policies under precisely such conditions, saying (at p. 273):

> "The agreed fact must not be overlooked, that the company, from the time it commenced business, until the year 1871—more than two years after entering into the contract with the assured—always issued paid-up policies upon the basis of the full amount of premiums paid as they were paid by the assured appellee, making no distinction between the notes and money received by the company for the premiums.
>
> "*The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to.* The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.
> * * *
>
> "When it was proposed by the assurer to apply the new rule and practice in this case, the assured might well say '*non in hæc fedora veni*,' and insist upon the interpretation which prevailed in other like cases when the parties became bound to each other, and continuously, for two years later. *The proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt.*"

So it may be said in the case at bar that, if any change in the practice of the parties, in relation to the transportation, had been contemplated in the Philippines contract, so as to exclude their "wives and children" from first-class accommodation with the "officers," and so as to relieve the United States from the obligation to pay therefor accordingly,

"*the proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt*"; but, as the Court has seen, no change whatsoever in phraseology was made, except the introduction of the clause as to "*such other persons* as may be designated by the Secretary of War," which, as we shall see, had no bearing upon the matter in controversy, but related to the transportation of an entirely different class of persons, *in addition to, and other than*, "*prisoners of war*," within which class the "wives and children" were specifically included. Failing to correct their practice in such a way as to "create certainty and exclude doubt," we should naturally expect, and, indeed, shall respectfully insist, that the United States is absolutely concluded by this practical construction of the previous Cuban contract, relating to the same subject-matter and a part of the same transaction between the same parties. *Cabin rates were paid by the Government under the Cuban contract, and no question was raised.*

This same practical construction, it will be remembered, was also followed under the pre-existing *oral* Philippine agreement, under which, for a period of four months prior to the written contract, the United States used the appellants' ships for the transportation of these "*wives and children*" *of* "*officers*" *in the cabins with their husbands and fathers.*

In construing a contract for public improvements in the District of Columbia, this Court, in holding that the *practical construction* placed upon the contract by the acts of the parties, *although at variance with its literal meaning, must prevail*, said:

> "The work, as actually done, was done under the direction and supervision of the district engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract and to be paid for at the contract price. *We think that the prac-*

tical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

District of Columbia vs. *Gallaher*, 124 U. S., 505, 510.

II.

The Contract and the Surrounding Circumstances.

In the light of the foregoing authorities and of the familiar rules which they express, we come to a further consideration of the facts.

The Terms of Capitulation.

The written terms of capitulation provided for the reference to the Government at Washington of all questions relating to the "repatriation" of the Spanish "officers and men" "*and of their families,*" and relating to the "*expenses*" therefor (Finding II, Rec., p. 26).

The Treaty.

We, accordingly, find that, while under Article V of the Treaty of Peace the United States agreed to "send back" the Spanish "*soldiers,*" Article VI required the "return to Spain" by the United States of "*all persons made prisoners of war*" in *Cuba* and the *Philippines*—all "at its own cost."

The similar Cuban contract and situation. No questions ever raised thereunder.

In fulfilling that obligation the United States first provided for the transportation of the Spanish pris-

oners in *Cuba* by a contract with the appellants which declared, in substantially the same terms as those found in the Philippines contract in the case at bar, that "cabin accommodations" should be supplied to "*officers*," with "third-class or steerage accommodations," "for the enlisted men or privates;" the United States to pay for such transportation "the sum of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for *each officer*." The contract distinctly provided for the transportation of "all of the *troops* of Spain that were surrendered by General Toral," and for no other class.

As a matter of fact, there was in Cuba, as in the Philippines, a large number of women and children, the "wives and children" of "officers" as well as of "enlisted men," and, notwithstanding the precise and special terms of the contract, *such "wives and children"* of "*officers*," it appears, were *actually carried* by these appellants *in the cabins with their husbands and fathers, and were actually paid for by the United States at the first-class rates* prescribed for "officers" having such cabin accommodation.

No question or doubt, it appears, was ever raised, and it was not deemed that there was any uncertainty in that contract to be remedied in the subsequent contract, for the Philippines transportation, between the same parties. Inasmuch as it does not appear that there was any mischief or uncertainty thus to be remedied, it is not singular—indeed, is quite natural—that we should find that *no change of phraseology* whatever, *in this respect*, was made by the parties in the later contract.

Philippines Situation.

Conditions required prompt repatriation both of the actual "prisoners of war," including "families," and of "such other persons as may be designated by the Secretary of War," for political, sanitary or other reasons satisfactory to him. Hence, the con-

tract and its performance were made to cover these extraordinary conditions.

As we have seen, in the Treaty of Peace executed at Paris on December 10, 1898, the Government of the United States undertook to "return to Spain," not merely "Spanish soldiers" (Art. V), but (Art. VI) "*all persons* made *prisoners of war*," as well as "all Spanish prisoners in the hands of the insurgents," whose release the United States undertook to obtain (Finding III, Rec., pp. 26-27). It appears that there was a large number of persons in both civil and military life who, *with their "wives and children*,"—their "*families*"—were in a pitiable condition, physically exhausted by exposure and disease, *including small-pox*, and whom it was desirable to ship away from Manila and *to get rid of at any cost, in order to avoid infection and other serious drains on the resources of the United States.* Besides these, there were many nurses, nuns, sisters of charity, lady pensioners and other ecclesiastical functionaries. On this subject, the Court of Claims found that—

> "There was surrendered to the United States forces at Manilla on August 13, 1898, a large number of civil, naval, and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men. *Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time*—all of them fed, guarded and attended at the expense of the United States. *Small-pox had been prevalent and infection was apprehended.* The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. *Many of these had wives and children with them.* There were besides a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity and lady pensioners*" (Findings IV, Rec., p. 27).

It was also found, in the same connection, that the United States—

> "*treated all of these classes as prisoners of war*" (same finding, Rec., p. 27).

In addition, as this Court judicially knows as matter of history, there were Spanish newspaper editors, ecclesiastics and other Spaniards who were constantly abusing and criticising the United States of America and its officials, and who were supposed to be rendering valuable aid to the insurgent cause in the Philippines, numbers of Spaniards actually officering the insurgent troops. It may very well be that the United States was doubtful as to whether all of such persons could properly be classed as "prisoners of war," within the meaning of the Treaty, and yet, historically, it is well known that General Otis and the other officials of the United States in the Philippines were most anxious to get rid of all that Spanish portion of the population. As the Court below, speaking of the historical fact, said (Rec., p. 41):

> "The situation of the prisoners and the small naval and military force of the United States among millions of natives made it *very desirable* for this Government *to rid the islands of Spanish influences as quickly as possible.*"

The Spanish element in the Philippines was always a discordant one; was at one time hated by the Filipinos, but afterwards, to some extent, proceeded to aid them as against the United States; and was continually a thorn in the flesh. It must, at this time, have been largely composed of the riff-raff of the long Spanish occupation. The *Spanish friars* were an important ruling class, locally, and were cordially hated by the Filipinos, who felt towards them "great antagonism." "This hostility was beyond doubt one of the causes of the rebellion of 1896." Indeed, Aguinaldo stated that

"the primary causes of the Philippine revolution were the *ecclesiastical corporations*," and he—

> "denounced as *dangerous to the interests of the Philippines* the allowance to the regular *Spanish clergy* to continue their rule in the islands, *believing that they would incite a counter-revolution* in the interests of Spain."
>
> 1 Report of Philippines Com. (Jan'y 31, 1900), at p. 130.

It was said that—

> "*The priests, the bad Spaniards, and these exploiters are the people who have made all the trouble.*"
>
> 2 *id.*, at pp. 8 and 1, 98, 99, 100.

See also—

> "Report of Major-General Otis on Military Operations and Civil Affairs in the Philippine Islands, 1899," pp 49, 51–52, 75–76, 164; also pp. 41 and 53.

Accordingly, we find that, by the terms of the contract, the Secretary of War reserved to himself the right to rid the Islands of all persons, whether actual "prisoners of war" or not, by providing that the appellants should transport, *not only* "*prisoners of war*," *but also* "*such other persons as the Secretary of War may designate.*"

The conclusive antecedent Philippines ORAL *agreement and its practical interpretation.*

For these reasons, we are not surprised to find that, as early as October, 1898, before the treaty was signed—

> "General Otis, commanding the United States forces in Manilla, considered that *an emergency* existed requiring immediate action." (Finding V, Rec., p. 27.)

He thereupon, it is further found—

> "On October 7 and October 24, 1898, cabled the War Department at Washington the re-

quest of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compania Transatlantica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but *under an oral agreement with plaintiffs* as hereinafter stated." (Finding V, Rec. p. 27.)

It then further appears that—

> "In the *emergency* deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into *an oral agreement with the petitioners*, under their firm name of J. M. Ceballos & Co., by which the latter agreed to transport such of the Philippine *prisoners* as the United States *desired to return to Spain, the price to be paid for such transportation to be the price fixed* after the United States should advertise for bids for such transportation, *under contract expected thereafter to be entered into* under the terms of a treaty of peace between the United States and Spain.
>
> "*Under this oral agreement* the petitioners *immediately began furnishing vessels*, and the transportation of the Philippine *prisoners* commenced by the first vessel in charge of plaintiffs which sailed from Manila, *November 7, 1898*, and *continued until another and a written contract* was entered into for the transportation of those prisoners not transported under the oral agreement." (Finding VI, Rec. p. 28.)

These shipments, of course, included the officers' "*families*"—"*wives and children.*" (Rec. Findings X and XI, pp. 32-33, and V and VI, pp. 27-28)—who, as we have seen, were among the sick whom it was desirable to be rid of (Findings IV, Rec. 27). *This antecedent oral agreement and its practical construction thus become conclusive.*

It clearly appears that, when "*sick Spanish* OFFICERS *and* SOLDIERS" (these being *the only*

classes mentioned in the request for transportation) were, in the existing "emergency," transported to Spain by the appellants under this *oral* agreement, beginning as early as *November 7, 1898*, as requested by General Otis (Findings V and VI, Rec. pp. 27-28), there were *also transported*, as matter of course, "*in the cabins*," *with them*, "*their respective families*" (Finding X, Rec. p. 32). That was the procedure followed down to the time of the written contract, which thereupon "*fixed*" "*the price to be paid*," and *thereafter the same practice continued to the end* (Finding X, Rec. p. 32).

If, as appears, "their respective *families*" were thus transported upon such a simple request for the transportation of sick "*officers*," it must be assumed that, when the written contract similarly provided for the transportation of "officers," it was intended to include "their respective families in the same way.

The Subsequent Written Contract.

At the outset, it is worthy of note that these Cuban and Philippines contracts, as well as the advertisements or proposals for this transportation, were all devised and drawn by military men (doubtless in the Quartermaster-General's office where the advertisement was prepared—Finding VII, Rec. p. 28), who naturally employed only military terms—for example, "officers" and "enlisted men"—to cover the entire situation.

They were also Government contracts—*devised under the Quartermaster's proposals and drawn by the Government. The language was that of the Government, and must be construed most strongly against the Government.*

On *January 20, 1899* (Finding VII, Rec. p. 28), the United States first advertised for bids and proposals "for the transportation of the Spanish *prisoners of war* now in the Philippine Islands." In substantially the same language as that employed in

the Cuban contract, it was provided in that advertisement, notwithstanding the recognized existence of the women and children, that "cabin accommodations are to be supplied for the *officers* and third-class or steerage accommodations * * * for the *enlisted men.*" The number was stated to be "about 16,000 officers and enlisted men." It was required that the proposals should state the price per capita for transporting "officers" and for "enlisted men" (Finding VII, Rec., p. 28). A bid was made by the attorney in fact for the complainants substantially in the terms of the advertisement, the words "*officers*" and "*enlisted men*" (as in the Cuban contract, and in the request of General Otis for transportation under the *oral* contract) being alone employed (Finding VIII, Rec., pp. 29-30).

This bid of the appellants was accepted (Finding IX, Rec., p. 30), but, when, on March 4, 1899, the parties came to the formal expression of their contract in writing, covering this transportation (which, as we have seen, had actually begun, on the part of the appellants, trusting implicitly to the good faith of the United States, as early as November, 1898, four months before), it was seen, from the nature and actions of the Spaniards, and the circumstances to which we have adverted, that it was absolutely *essential to make provision, by some terms other and more general than those previously employed in the Cuban contract, for the possible transportation of those persons who might not be regarded strictly as "prisoners of war," and yet who, as we have seen, were annoying and dangerous elements in the Islands whom it was desirable, on all accounts, to be rid of and to return to Spain.*

Therefore, we find that, *in addition to the class, "prisoners of war,"* referred to in the treaty, and which, of course, included the "officers" and the "enlisted men," covered by the terms of the Cuban contract, the oral contract, and by the advertisement and bid in the case at bar, the parties ex-

pressly provided that the appellants should carry *an entirely different class of persons* among whom might be grouped all disturbing and disloyal elements, whom the United States might wish to send away from the Philippines and return to Spain. This *additional class* is described throughout the contract as "*such other persons as may be designated by the Secretary of War*"; and to "*such* other persons" the contract provides that "third-class or steerage accommodations" shall be given, like those provided for the "enlisted men." In the clause for the appellants' compensation, it was distinctly provided that *such "other person designated by the Secretary of War" should be paid for at the rate allowed for each "enlisted man" or "private soldier,"* that is to say, $73.75. (See Contract, Finding IX, Rec., pp. 30-31).

In this way the United States carefully provided for the complete fulfillment of its treaty obligations in respect to all "prisoners of war," and likewise provided the means for completely protecting itself in the Philippines by the expatriation and return to Spain of those dangerous elements in the Spanish population to which we have referred.

Thus, we see that there was a somewhat more extended and critical situation confronting the United States, when it came to frame the Philippines contract than that which it was required to meet in the case of the Cuban contract. In the latter case, there were merely the "prisoners" to be dealt with. In the Philippines, on the other hand, there was this element, seditious and, in view of our comparatively small force there, dangerous, which it was felt might extend beyond the bounds of a classification limited merely to "prisoners of war." Hence, the classification in this contract, and the provision for "*such other persons as may be designated by the Secretary of War.*"

It is seen, then, that, with this obvious and distinct purpose in mind to provide for persons *other than "prisoners of war,"* the phrase "such other

persons as may be designated by the Secretary of War" cannot possibly have any application to those persons who were classified and treated by the United States at all times as such "prisoners of war."

As we have pointed out, while Article V of the treaty provides for the return to Spain of the Spanish "soldiers," Article VI, *in addition*, specifically refers to the return of "*all persons* made prisoners of war;" so that the "prisoners of war," thus to be returned, were not limited to "soldiers," but included "all persons" whom the United States might class as such "prisoners."

Turning, now, to the contract (Rec., pp. 30-32), we find that, after reciting the treaty and the acceptance of the appellants' proposal for the return of the "Spanish prisoners," it declared that the agreement had been entered into for the transportation of "*said prisoners of war*," "*as are designated in the terms of the treaty of peace* referred to and quoted herein."

With the obligation of the United States defined in the the treaty as extending to "*all persons*" made "prisoner of war," we then find that the United States, through its Attorney-General, speaking of this contract, has admitted that—

> "As between these contracting parties, *it rested alone with the United States to say whom it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract.*"
>
> 23 Opin. Atty-Genl., 9, at p. 17.

Under all of these circumstances and conditions to which we have referred, it appears, then, that the United States deemed it wise, as we have said, to *extend* this obligation created by the treaty to include the return to Spain not merely of

"prisoners of war," but of *all "other persons designated by the Secretary of War."*

In other words, the contrast in the contract is not made between different classes of "prisoners of war," of whom the "other persons" are made a subordinate or third class with "officers" and "enlisted men," but is, on the contrary, throughout all of its paragraphs dealing with the question, plainly made between "*prisoners of war*" on the one side, "AND *such other persons as may be designated by the Secretary of War,*" on the other.

We are, therefore, not in any way concerned with the identification of those persons whom the United States might group or class as "persons designated by the Secretary of War," but only with the vital question, *What persons did the United States classify as "prisoners of war"?* On this head, the facts found below are absolutely conclusive, and, as we conceive, finally dispose of the case.

The Court of Claims found (Finding IV, Rec., p. 27), as we have seen, that—

> "there was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval and military officers *and their families*, and a much larger number of enlisted men, together with the *wives and children* of some of these enlisted men."

Also that—

> "The *civil prisoners* included Spanish civil officers on duty in the Philippine Islands under the Government of Spain. Many of these had *wives and children* with them. There were, besides, a number of civilians, such as *nurses, nuns*, monks, friars, *sisters of charity and lady pensioners.*"

The question then arises as to how the United States treated and classified these "*families*," these "*wives and children*," and these "*nurses*," "*nuns*," "*sisters of charity, and lady pensioners*"? Particularly are we interested in the question as to how the

"wives and children" and "families" were regarded. The Court of Claims has answered that question conclusively. It has found that—

> "*The United States treated all* of these classes *as prisoners of war*, and had *supreme control of them* after the surrender of Manila *until they were delivered aboard plaintiff's ships for transportation*, at which time the *supervision* of the United States ceased. Spanish officers had, in the mean time, only such supervision over their troops as the United States permitted."
>
> Finding IV, Rec., p. 27.

Inasmuch, therefore, as the United States, with complete power to select and reject, in fact thus treated the "*families*"—the "*wives and children*"—of officers and of civil prisoners, and the other women found among the civilians, *as* "*prisoners of war*," such persons became, under the *terms* of the contract, absolutely entitled to transportation, *not as* "*other persons designated*," *but* as such "*prisoners of war.*"

The specification of "prisoners of war" in the contract, is the limited and arbitrary one found in the Cuban Contract, and in General Otis' request for transportation under the oral contract (Finding V, Rec., p. 27), of "officers," on the one hand, and "soldiers" or "enlisted men," on the other. It is the very generality of such description, which presents the only question of construction in this case, because, as we have said, and are about to point out in the course of a more detailed analysis of the contract, the words "other persons," referred *not to any of these* classes, grouped as "prisoners of war," but to *the entirely different class*, described by the contract (in sharp antithesis to this broad class of "prisoners of war"), as "such other persons as may be designated by the Secretary of War." *It is these* "*other persons*" *alone* who are classed with the "enlisted men" and forced into the steerage at third-class rates by the terms of the contract.

It is at once seen that this preliminary analysis and view of the contract, considered in the light of the situation of the parties, presents a perfectly consistent and reasonable idea and scheme in harmony with what must have been the intent of the parties.

On the other hand, the narrow view of the Government, to the effect that the incorporation of the words "other persons," following the words "enlisted men," shows an intention to include the "wives and children" of "officers" with the "enlisted men" as persons entitled only to *steerage accommodation*, who were to be carried at third-class rates, is so utterly at war with the expressed intention of the parties, to give, as the contract provides, "*safe and comfortable* transportation" to such persons, and is so clearly unjust and absurd, and so violates the humanities, in assuming that the parties intended, on the one side, to force such women and children into the filth of the steerage, and thus separate and divorce them from their husbands and fathers, during a thirty-two days voyage in the tropics, and, on the other, to force the appellants to carry such persons, who must naturally and consistently receive cabin accommodation, at third-class rates, that it must be wholly rejected as involving an absolute subordination of all reason and sense to the alleged letter of an instrument, which, plainly, if so limited, could not possibly be made to satisfy the intention of the parties.

Moreover, it appears, that this assumed construction by the Government of the terms "other persons," as including "wives and children" of "officers," is absolutely forced, and is at war with the very words of the contract itself. Apart, therefore, from its inherent unreasonableness and injustice, it must, for this reason alone, be summarily rejected.

Recurring, now, for a demonstration of this last proposition, to a more detailed analysis of the contract (Rec., pp. 30-32), we find that, after reciting the treaty, the proposal, and the purpose of the contract to secure the transportation of the Spanish

"prisoners of war," "as are designated in the terms of the treaty of peace," the instrument declares that Ceballos & Company agree to furnish "good and safe" transportation—

> "for such number of *prisoners of war* AND *persons as may be designated by the Secretary of War.*"

Here we find the first distinction made between the "prisoners of war," who were absolutely entitled to transportation under the treaty, and the *additional* class, "*persons as may be designated.*"

In the next paragraph, Ceballos & Company agree that, for this purpose, they will provide a sufficient number of steamships for the "safe and comfortable transportation" of the—

> "*prisoners of war* AND *such other persons as may be designated by the Secretary of War.*"

Thus the classification between "prisoners of war," on the one hand, covered by the treaty, and on the other the additional class of "such other persons as may be designated"—included for the purpose of giving the Secretary of War an ample discretion in ridding the islands of obnoxious persons—is even more clearly emphasized.

In this same paragraph, immediately after this clause, the contract proceeds to provide for the accommodations to be furnished, and we find that the "prisoners of war" are plainly divided into "*officers,*" for whom cabin accommodations are set apart, and "*enlisted men,*" for whom third-class or steerage accommodations are provided. The class of "*such other persons as may be designated by the Secretary of War*" is then *grouped, with respect to accommodation, with the "enlisted men,"* the clause, as a whole, reading as follows:

> "The said Company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the

> safe and comfortable transportation of the *prisoners of war* AND *such other persons as may be designated by the Secretary of War*, with cabin accommodations for all officers, and third-class or steerage accommodations, space and ventilation for the enlisted men AND *other persons* on board each ship" (Rec., p. 31).

Throughout the contract, as here, there is no other antecedent to which to refer the last repeated words "other persons," except the immediately preceding clause in the same paragraph in which the identical words are used; that is to say, "such other persons as may be designated by the Secretary of War," or, as in the immediately preceding paragraph, "and persons as may be designated by the Secretary of War." The immediately following paragraph makes provision for the completion of the embarkation not later than May 1st, 1899, of "the *prisoners of war* AND *other persons.*"

Immediately following this last paragraph, however, we come to that which provides for the *compensation* to the appellants for the service to be rendered, and we find that this paragraph is even more specific, in point of definition, than those which have preceded, and, relating, as it does, to the subject of compensation, which is the point now at issue, it is quite conclusive. That clause (Rec., p. 31) declares that, in consideration of the faithful performance of the foregoing provisions of the contract, there shall be paid to Ceballos & Company for——

> "Each *commissioned officer*, the sum of two hundred and fifteen dollars ($215) and for each *enlisted man, private soldier*, OR *other person designated by the Secretary of War for transportation*, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said *officers, enlisted men* OR *persons* have been transported, subsisted and delivered on shore in Spain."

Following this paragraph comes a provision gov erning the delivery by the United States of the persons to be carried, which provides as follows (Rec. p. 31):

> "It is further agreed that the *prisoners of war* AND *all other persons to be transported* shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War—"

within certain limits of time, which the contract specifies. It would be impossible to outline more clearly than do the words of the contract itself, in these last two clauses, the distinction between "*prisoners of war*," on the one hand, AND "*other persons designated by the Secretary of War for transportation*," or, as otherwise expressed, "*all other persons to be transported*," on the other. It is evident that these latter words, in each instance, define *the entirely separate and distinct class* previously referred to in the contract. There are, first, the "*prisoners of war*" (plainly divided into the classes, "commissioned officers" and "enlisted men" or "private soldiers"), and then, secondly, "ALL OTHER *persons* to be transported," or "designated by the Secretary of War for transportation."

The final clause, in respect to the count and computation of persons carried, as the basis of payment, refers to the "number of officers, enlisted men, OR *other persons*," and to the "number of officers, enlisted men AND *persons* counted on each ship." Here, finally, in the contract, we find the distinction more specifically made, not between "prisoners of war" treated generally on the one hand, and on the other, "all other persons," but between the classes into which the general class, "prisoners of war," has been divided, that is to say, between "officers" and "enlisted men," on the one side, and the other class, called "persons," and

otherwise defined *by the contract itself*, in the same connection as "*persons designated by the Secretary of War*," on the other.

Thus, it appears, from these detailed references to the very *letter* of the contract, that it was the plain intention of the parties—and no argumentative exposition can make it plainer—to provide for the transportation of two distinct groups, the one called "prisoners of war," or otherwise divided into "officers" and "enlisted men," and the other called "all other persons to be transported," who in both the compensation clause of the contract and that which specifies the accommodation to be afforded, are each time defined as "*such other persons as may be designated by the Secretary of War*," or "*other persons designated by the Secretary of War for transportation*."

But we must remember that the treaty itself has provided, in Article VI, that "*all persons* made prisoners of war," are to be returned to Spain at the cost of the United States, and we find it conclusively adjudged, as a fact, that among these "*persons* made *prisoners of war*" were the "*families*" the problem of whose repatriation was expressly referred to Washington (Finding II, Rec., p. 26), or, as otherwise expressed, the "*wives and children*" of the "officers" and "enlisted men," and also "nurses," "nuns" and "sisters of charity and lady pensioners" (Finding IV, Rec., p. 27), and, as to these, we are told that "the United States *treated all* of these classes *as prisoners of war*," with "supreme control of them," "until they were delivered aboard plaintiff's ships for transportation."

Obviously, therefore, when this contract provided for the transportation of "*prisoners of war*," as one class, *it was referring to these very people thus described and treated by the United States as such* "*prisoners of war*," and when, to cover the contingencies of the then existing situation, treated as an "emergency," it referred to, "*such other persons as*

may be designated by the Secretary of War," or, as otherwise phrased in the contract, "*all other persons* to be transported," it was providing for *a totally distinct, and, as it were, supplemental class,* for whose accommodation and transportation it was also necessary to make specific provision in the contract. To be sure, these "other persons to be transported," and thus "designated"—presumably the riff-raff and flotsam and jetsam of Spain's population—were grouped with "enlisted men," for the purpose of defining both their accommodation and the price to be paid therefor, but it is too clear to require further comment that they were not grouped with these "enlisted men" as part of the "prisoners of war," but *as an entirely different class of people,* whose transportation, for good reasons, the Secretary of War desired to provide for.

From this examination of the letter of the contract, it is also manifest that all the persons who were classed and were, in fact, "treated" by the United States "as *prisoners of war," required no designation whatever by the Secretary of War.* It was only these "other persons to be transported" *whom it was necessary that he should designate* in order to secure their transportation. And it appears that the "families"—"wives and children"—with other women specifically described, were *all classed and "treated" by the United States as "prisoners of war"* (Finding IV, Rec., p. 27). That was a matter absolutely *settled before either the oral or written contract was made. No designation as to them,* therefore, was required on the part of the Secretary of War. *They were not "such other persons as may be designated." They were described, and were to be carried, as "prisoners of war,"* and the requirement of the Secretary's *designation was, as we have said, limited solely to "all other* persons to be transported"—that is (as is plainly apparent from

the contract as a whole, and particularly from the paragraphs relating to accommodation, compensation, and delivery aboard ship) *other than "prisoners of war,"* the class, "prisoners of war," being already sufficiently defined by their treatment and classification as such by the United States.

If, then, we inquire, by process of elimination, who were to be carried in the cabins at first-class rates, we find the definition and specification in the very language of the contract, which declared that the appellants should be paid for "each enlisted man, private soldier, OR *other person designated by the Secretary of War for transportation* the sum of seventy-three dollars and seventy-five cents ($73.75)." These were the *only persons to be carried at third-class rates.*

It, therefore, follows that all others were to be carried at cabin rates. It cannot be said that officers' "families"—"wives and children"—are included among "such other persons," *because "the United States treated all of these* classes *as prisoners of war,"* and the contract makes this plain distinction between "prisoners of war" and "such other persons as may be designated by the Secretary of War." Finding, therefore, that the *only "prisoners of war"* carried at *third*-class rates in the *steerage* were the "*enlisted men*" or "*private soldiers,*" if we also find, as we do on referring to Finding IV, that among the "prisoners of war" were, with others, the "*families*" *and* "*wives and children*" of "officers," *the only possible inference is that they were to be carried at the only other,* or *cabin, rate.* We are not dealing with the question of the "enlisted men," although it is equally clear that the "wives and children" of "enlisted men" were also "prisoners" following their husbands and fathers, naturally, into the steerage. In short, the only provision in the contract as to "prisoners of war," in this respect, declares that the "enlisted men" and "private soldiers" (presumably with their own

"wives and children," also "prisoners of war") are to be carried at third-class rates. All other "*prisoners of war*," consequently, went at cabin rates.

If (and such is the fact), "the United States *treated all* of these classes *as prisoners of war*," that is to say, these "wives and children," these "families" of "officers," then, by the *terms* of the treaty as well as by those of the contract itself, they were entitled, *as such* "*prisoners of war*," to be returned to Spain, and the United States so provided. They were all to be carried in the appellants' ships. There can be no doubt as to that. And there were *only two classes of rates of compensation* to be applied. (See 23 Opin. Atty.-Genl., at p. 18; Opin. below, Rec., p. 46). *If, therefore, they were not* (and we have shown that they clearly were not) *included in the third-class rates, their transportation must be included within the cabin rates,* under the designation "officers." This latter term, it thus appears, *is simply another term for first-class accommodation.* These classes of persons, thus treated by the United States as "prisoners of war," cannot be excluded. That is plain. And it is equally plain that they are not included among those carried at third-class rates, as "enlisted men," or "private soldiers," or "such *other* persons as may be designated by the Secretary of War for transportation"—the latter including, as the contract clearly defines it, *only* "*all* OTHER *persons to be transported,*" that is, *other than* "*prisoners of war.*" These latter, as we have seen, require no designation. As, therefore, these "wives and children" as "prisoners of war" *must* be carried, it is plain that they must go where they naturally belong—in the cabins, with their husbands and fathers, at cabin rates.

And *such*, it appears, was *the consistent and uniform practice of the parties under all three contracts*—the *Cuban*, the *Philippines oral*, and the *Philipines written*, contracts.

Thus, merely by reference to the *terms* of the contract itself, the whole weakness and futility of the contention of the Government and of the court below are exposed—for that contention rested solely on the proposition that "wives and children" could not be carried except as "*other persons*," and, *therefore*, at *third*-class rates.

At this point—in connection with the grouping of their "wives and children" with the "officers"—the illustrations, hereinbefore referred to, of the similar construction of special words, should be borne in mind. It has been held, as we have seen, that "*child*" may include "*grandchildren*"; "*single women*" may include "*married women*"; "subscribing witness", the *husband* of such witness; "administrator", administrator *de bonis non;* etc.

The surrounding circumstances also compel rejection of Government's contention as unreasonable and violative of intention.

As fortifying this contention as to the manifest intention of the parties, drawn from the *terms* of the contract, there are certain other conclusive circumstances, in the relations and situation of the parties, which may be briefly referred to.

*The Government knew in advance that the "families"—whom it "treated * * * as prisoners of war"—had to be transported* (Findings II and IV, Rec., pp. 26–27). It will be remembered that, by the terms of the capitulation, in *August*, 1898, "all questions relating to the *repatriation* of officers" "*and of their families*," and to the "*expenses*" relating thereto, were "*referred to the Government of the United States at Washington*" (Finding II, Rec., p. 26), and the treaty provided for the return of "*all persons* made prisoners of war."

The contract, in terms, provides that Ceballos & Company shall furnish "*good and safe* transportation," and shall provide a sufficient number of

steamships for the "*safe and comfortable* transportation" of the persons to be carried. In the case of the "families"—the "wives and children"—of "officers," it is evident that such "*safe and comfortable* transportation" could not possibly be had in the steerage.

The voyage from the Philippines to Spain, as the Court must know as a matter of general knowledge and judicial notice, *occupies about thirty-two days*, and is, throughout, *in the midst of the heat of the tropics.*

As emphasizing the assumed effect of tropical conditions, the bid tendered to the Quartermaster-General for this contract by the appellants, in reply to his advertisement, sets forth that—

> "It is proposed not to load the steamers beyond two-thirds their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary, owing to climatic conditions and length of voyage" (Rec., pp. 29-30).

The contract on this particular point also provides that—

> "The Company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to" (Rec., p. 31).

The "wives and children" of "officers," both civil and military, were, presumably, of gentle breeding and refinement, and were doubtless, many of them, persons of a high degree of rank and culture. Spain, it will not be forgotten, is a monarchy of the old school, in which there persist, even to-day, with startling emphasis, the ancient aristocratic distinctions of rank between the different classes of the population. Many of the Philippines civil and military officials, it is well known, were persons of rank and distinction. Spain had been in occupation of the islands for centuries, and, that long

occupation now being brought to an end, the whole civil and governmental establishment—not merely the army of occupation—was to be returned to the mother country as "prisoners of war" There was the necessary accumulation, as a part of the ancient, aristocratic régime, of many officials, civil and military, of aristocratic rank, with their families. It might well have been that members of the royal family or household might have been caught in this predicament at Manila. Their situation would have been precisely the same as that of the President of the United States and his family placed in similar circumstances.

"*Safe and comfortable* transportation" *for such persons* certainly requires that they should be carried *in the cabins with the officers, their husbands and fathers.* If they were not to becarried in the steerage, but in the cabins, then, certainly, in reason and common sense, their "safe and comfortable transportation" was to be paid for at the rate which such accommodation commanded, that is to say, the cabin, or first-class, rate.

So, too, as we have heretofore intimated, *it is absolutely unreasonable to impute to the parties an intention to separate and divorce husbands and fathers, the "officers" in question, from their "wives and children."* In other words, where the "officers" were carried, there we must assume that the parties intended that their "wives and children" should be carried also. *It could not have been intended needlessly to separate families,* on this long, hot and dangerous voyage, especially familes who were being carried to their *homes* in Spain. We may take it for granted that accommodations were dependent upon station in life and standard of living; that the dictates of humanity and the usages of civilized society were to prevail; and that, if the father and husband was to be carried in the cabins, there it was intended that his wife and his children should follow him. So, again, if the husband and father was an "enlisted man," to be car-

ried in the steerage, there, obviously, it was the intention that his wife and his children should likewise follow him.

The Government's contention necessarily involves such an imputation of intention thus to separate families, placing the more delicate and sensitive members, "the wives and children," in the steerage, in violation of all known usages and of all human feelings, and the husbands and fathers in the cabins. As we have said, this is wholly unreasonable and unnatural, especially in view of the character of the voyage in question, and the quantity of filth, and the utter degradation of the personal associations, in the average steerage accommodations.

In any event, the Government's contention involves the suggestion that the parties intended that, if the appellants saw fit (because it is said that the Government did not intervene, or "*assign*" accommodations—Finding X, Rec., p. 32) to carry "wives and children" in the cabins, that was purely an affair of the appellants, for they must have understood that they could charge for such accommodation *only the third-class rate*. But, equally with the former suggestion, it is also unreasonable to impute such an extraordinary intention to the parties, to request, on the one hand, and to charge, on the other, only a third-class rate for what the parties must have known would be the first-class accommodation required to be furnished.

On this head, too, it will be seen at once that the only possible reasonable basis (which is utterly lacking here) for this argument or suggestion on the part of the Government, involving this assumption of an intention to give first-class accommodation to the "wives and children" for a third-class rate, must be found in an assumed *knowledge* on the part of the appellants of the *number* of "wives and children" thus to be carried, for, in that event, with such preliminary knowledge of the numbers, it

might perhaps, with some propriety, if not much force, be contended (see Opinion below, Rec., p. 46) that Ceballos & Company might naturally have counted upon a wholesale profit on the whole transaction, and have assumed from actual computation that it would be sufficient in amount to enable them thus to carry—as a mere incident and at the lower rate—these "wives and children" in the cabins with the "officers," their fathers and husbands. But, inasmuch as there is, as we have said, *no basis of fact for this contention* (it nowhere appears that the numbers were known, and, in fact, the total number, even of *soldiers*, who were "prisoners of war," was only approximated, Rec., pp. 28–29, 38), the argument falls to the ground.

In the performance of the contract—both oral and written—the "wives and children" were actually included by the United States, and it cannot now complain.

In point of fact, it appears that—

> "In performing the obligations of their contract, the petitioners supplied vessels with cabin accommodations and steerage accommodations as had been agreed, *and in the cabins were carried the officers, civil and military, with their respective* FAMILIES, *and in the steerage, the enlisted men and their* FAMILIES, *and other persons entitled to third-class passage*" (Finding X, Rec., p. 32).

And, as we have pointed out, it appears that the *Government thus knew* they were so being carried, *under the oral agreement, before the written contract* (Findings, II, IV, V, VI, X and XI).

The Court of Claims then proceeded to make the utterly immaterial, and, as it seems to us, the wholly unnecessary declaration (We are claiming upon an *express contract*) that—

> "*It does not appear* from the evidence in the cause that the United States assigned

> or designated cabin accommodations for the commissioned officers, or the wives and children of the commissioned officers. The evidence does establish to the satisfaction of the Court that when the wives and children of the military and civil officers of the Spanish Army in the Philippine Archipelago went on board the plaintiffs' vessels, the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates" (Finding X, Rec., p. 32).

Why should they? The contract, after stating the amount to be paid for each person transported, provides:

> "The said sums to be due and payable *upon evidence* that said officers, enlisted men, or persons have been transported, subsisted and *delivered on shore in Spain*" (Rec., p. 31, Finding IX).

The appellants were themselves in New York, and in accordance with their contract had—

> "supplied vessels with cabin accommodations and steerage accommodations as had been agreed, and in the cabins were carried the officers, civil and military, *with their respective families*" (Rec., p. 32, Finding X).

In the requisition issued by the Quartermaster at Manila upon Ceballos & Company for transportation of these prisoners and other persons, it is specifically stated that:

> "Payment for this service will be made *in Washington, D. C.*, U. S. A., at the office of the Quartermaster-General of the Army" (Rec., p. 36, Finding XV).

It will be noted that in this requisition, which is a specimen of those issued by the Quartermaster at Manila, accommodations are called for—

> "10 commissioned officers,
> 258 enlisted men,
> 3 civilian officials,
> 8 *wives of officers and officials,*
> 3 *children under 3 years of age,*" etc.

And now it is claimed that, after the United States had solemnly agreed by treaty with Spain (as interpreted by the United States) to deliver these officers and their *families* in Spain, and after the United States had entered into a contract with the appellants to furnish the vessels to enable this Government to perform this obligation to a sister Nation, and after it had been stipulated in the contract that payment was to be made to the appellants *when* "*evidence*" was furnished that these persons had been transported, *subsisted and delivered on shore in Spain*, and after the written requisition, issued by the Quartermaster at Manilla upon these appellants for accommodations aboard ship, had specifically stated that the "*payment for this service*" rendered by the appellants "*will be made in Washington*, D. C., U. S. A., at the office of the Quartermaster-General of the Army" (Rec., p. 36), the United States will not pay for the service that it actually received, for the reason, forsooth, that the appellants did not, at the time of the *embarkation* of the prisoners, *make claim* against the United States for the service that the Government had accepted and received, and specifically arranged to pay for.

It must not be forgotten that the obligation of the appellants was to furnish to the United States vessels with sufficient cabin accommodations and sufficient steerage accommodations to enable the United States to carry out in good faith its agreement with Spain. *The appellants had nothing whatever to do with determining who were "prisoners of war," or who were "other persons designated by the Secretary of War." Their sole duty was to furnish a sufficient number of vessels, with sufficient accommodations*, and to furnish subsistence on the voyage, for all persons placed aboard by the authorities of the United States, to land these persons in Spain, and, after that was all done, to present their bill *at Washington* for payment. They were under *no obligation* whatever to demand,

in the Philippine Islands, payment for any person delivered aboard ship, and, if they had done so, they would doubtless have had their attention called sharply to the terms of the contract, which provided for payment *after* these parties had been "*delivered on shore in Spain.*" The appellants were *utterly powerless in respect to the selection of persons*, and were absolutely entitled to be paid for all persons whom the United States tendered or "delivered" for transportation.

All this the Government, speaking by its Attorney-General, *ante litem motam*, long ago admitted, saying:

> "It is entirely certain that, under this contract, J. M. Ceballos & Co. had *no control over, or anything whatever to do with, determining what persons, or how many*, should be thus received, subsisted and transported, *nor in determining the class of such persons*, as soldiers or civilians, *nor in determining whether the persons so tendered for transportation came within any of the classes described in the treaty of Paris. The authorities of the United States only were authorized to decide this*, and with their decision this steamship company had nothing to do, but was *bound to receive and transport all who were thus tendered*, and if that company has performed this service under this contract, *the payment therefor cannot be made to depend upon the wisdom or correctness of the decision.*"
>
> 23 Opin. Atty.-Genl., at p. 15.

Again:

> "*It rested alone with the United States authorities to say who should be taken* as prisoners, and as to which *the carrier had neither voice, knowledge nor means of knowledge.* but was, by the express terms of his agreement, *bound to carry all who were designated and tendered.* When one contracting party *requires* of the other more than should be required, but *which the other is bound to do, if*

> *required, and does it, it would be a novel rule which would permit the first party to refuse payment upon the ground that he ought not to have required so much.*"
>
> 23 Opin. Atty. Genl., at p. 17.

And after referring again to the conclusiveness of the determination made by the United States, as to the persons to be carried, the learned Attorney General repeated that (p. 17)—

> "*having done this by its authorized agents, and compelled the carrier to accept such decision and perform the service thus required, it does not lie with the United States now to refuse payment upon the ground that it or its agents were mistaken and required more than they should have done.*"

It should be borne in mind that the Court has also found, with reference to these "prisoners of war," that the United States—

> "*had supreme control of them after the surrender of Manilla until they were delivered aboard plaintiffs' ships for transportation, at which time the supervision of the United States ceased*" (Finding IV, Rec., p. 27).

And it appears from the contract itself that they were to be "*delivered by the United States on board the ships*" (Rec., p. 31).

It seems to us to be a most unworthy argument to suggest that, because the United States did not specifically assign accommodations, it is not bound to pay therefor under an *express contract* like that in question. We are *not* suing upon a *quantum meruit*. It does appear, however, that the United States had "*supreme control*" and general "*supervision*" over the persons to be carried and actually "*delivered*" them aboard ship. In view of the *terms of the contract*, it was, of course, quite unnecessary for the appellants to make any claim in respect to "wives and children," when they were

taken aboard ship. They naturally placed them where they belonged, that is, with the "officers," their husbands and fathers.

It is also true that *the mere tender and delivery* by the United States, for transportation as "prisoners of war," of persons classed as "*wives and children*" *of* "*officers*," *amounted in itself* not merely under the suggestion of the humanities, and in view of the general usage and understanding of civilized society on the subject, but also in view of what must naturally and reasonably be deemed to have been in the minds of the parties, to a *suggestion and requisition* of the only "safe and comfortable transportation" which could be given to *that class* of persons, that is to say, *cabin accommodation. The mere description of the persons and of their station in life*, in short, was the full equivalent of an affirmative assignment by the United States of such persons to such *cabin accommodations.*

The appellants merely furnished accommodations. They knew nothing of the character of the passengers. *The United States alone could know the rank and character of its prisoners and of the other designated passengers.* Accordingly, *when the United States* "*delivered*" *the passengers* "*aboard plaintiffs' ships*," *it in effect assigned accommodations* by the mere act of description.

Rather, it may be said that, if such "wives and children" were *not* to be carried in the *cabins*, it would have been incumbent on the United States to make an affirmative assignment to other quarters. Lacking such absolute negation on the part of the United States of the *natural* accommodation in the cabins for such persons, it was the natural, proper and reasonable course for the appellants to place them there with their husbands and fathers.

Even when it came to formal requisitions for transportation made by the United States upon the appellants, it appears (Finding XV, Rec., p. 36), that the number of "*wives of officers and officials*" and the number of "*children*" were expressly set

forth. As we have pointed out, the only inference from such a requisition, operating as the tender and delivery for transportation of such persons, was that they should be carried with their husbands and fathers. Cabin accommodation alone was indicated by the *mere description of the persons.*

In reason and common sense, therefore, it is inconceivable that, in requesting transportation for, and supervising the delivery to the appellants of, such "wives and children," the United States did not intend that they should have the only "safe and comfortable transportation" possible under the circumstances, that is to say, in the cabins where alone the family could be, and travel, together.

This is the natural, reasonable and just construction.

Strengthened, as we are, by these general considerations, the conclusion is irresistible, that, in using the broad term "officers," on the one hand, and "enlisted men" or "private soldiers," on the other, the parties intended to classify *all* of the "*prisoners of war*" in accordance with the classification made by nature and civilized society, with reference to their station in life—thus preserving the integrity of families, and giving to these "wives and children" the same accommodation furnished to the "officers," their husbands and fathers—from which it follows, as the only sensible and reasonable construction (for any other, on the face of this record, would lead to absurd, unnatural and most unjust results) that such accommodation, thus provided, was to be paid for at the first-class rates prescribed therefor. In this way, the general terms of the contract (substantially the same in that respect as those employed in the Cuban contract on the same subject) are effectively applied to the subject-matter, and, the classification of "such other persons as may be designated by the Secretary of War" being laid aside as wholly inapplicable to the

transportation of "*prisoners of war*," among whom these "wives and children" were classified by the United States, we are left free to work out the only sensible, natural and reasonable construction which can possibly be placed upon this instrument, to the effect, that is to say, that, in providing for accommodation and payment for the "officers," the "wives and children" of such officers were, under the circumstances, necessarily included.

This is the only construction which accords with reason and common sense, and which is consistent with the circumstances and relations of the parties. It is the only construction which avoids the imputation of an unreasonable and unnatural intention to the parties in respect to the nature of the accommodation to be furnished. It likewise avoids the unjust and unnatural suggestion that payment for such accommodation, whatever its nature, was to be made only at third-class rates. As avoiding absurdity and injustice, and as the only reasonable construction which the surrounding circumstances permit, it must be accepted.

Practical Construction under both the Cuban and the original oral Philippines Contracts. No doubt or question raised thereunder.

Beyond this, however, it clearly appears, as we have seen, that the Cuban contract, involving the use of the same terms in this respect, and the original *oral* Philippines agreement, were both practically treated by the parties as requiring the transportation of the "wives and children" of "officers" in the cabins, and as further requiring the payment therefor by the Government at first-class rates. Thus the parties construed the contract in practice.

It must be borne in mind that *no question or contest* was made by the United States in respect to this *Cuban* contract. There was *no controversy* between the parties as to the use or meaning of these

words "*officers*," or as to whether they included their "*wives and children*." There was, therefore, *no mischief or evil to be remedied in that respect, when it came* to phrasing the subsequent Philippines contract. Accordingly, we find that the parties naturally expected, and in fact made, the same classification of prisoners, as between "officers," on the one hand, and "enlisted men" or "private soldiers," on the other, which was adopted in the earlier Cuban contract. From the practice under that contract, no reason appears why the parties should have changed the earlier phraseology. We have already explained that the *addition* of the *new class* of persons to be carried, described as "*such other persons as may be designated by the Secretary of War*," was doubtless considered necessary because of the peculiar condition of affairs in the Philippines, and the "emergency" which had arisen there for the quick return to Spain of the Spanish prisoners and for *ridding those islands of all Spanish influences.*

We have also already pointed out that the Cuban contract related to precisely the same subject-matter, that is to say, the return to Spain of the Spanish prisoners under Article VI of the Treaty, and was an agreement between the same parties, thus covering the same general transaction. It was to all intents and purposes the same agreement concerning the return to Spain of "all persons made prisoners of war," whether in Cuba or the Philippines. Having thus been practically construed by the parties, and a further contract, with reference to the Philippines, having been made *on the footing and faith of the practical construction of the earlier contract*, it does not lie in the mouth of the United States, now, to question a construction thus conclusively established by its own deliberate action. Indeed, it may be said that it was because of that practical construction of the Cuban contract that the similar general expressions were employed in the Philippines contract. This

action of the parties must certainly be treated as controlling and conclusive in the case at bar.

Opinion of Attorney General.

Brief comment should be made, at this point, on the Attorney General's opinion with reference to this contract.

See 23 Opinions of Attorney General, 9, at pages 14–15 and 17–18.

In that opinion, the learned Attorney General, while admitting and stating, as we have pointed out that the United States might at its pleasure designate for transporation, and call upon the appellants to transport, any persons whom it might wish to return to Spain, assumed that all such persons must nevertheless be treated, and would thereby be treated, as "prisoners of war." He thus failed to make the true distinction, so clearly apparent on the face of each paragraph of the agreement, between "*prisoners of war*" on the one hand, and "*such other persons as may be designated by the Secretary of War,*" on the other. Failing in this distinction, the learned Attorney General missed the whole point in controversy. He simply *assumed* and stated that "wives and children" *might properly* be treated by the Secretary of War, at his pleasure, as "prisoners of war." *He did not know* at that time that it was *the fact* that actually "the United States *treated all* of these classes *as prisoners of war*" (Finding IV, Rec., p. 27). That fact is now adjudged by the findings of the Court below, and what the learned Attorney General treated merely as a possible assumption, or (see p. 16 of Opinion) as "questionable," that is to say, "whether all the persons tendered and transported were not within the purview of the Treaty, at least under such a liberal construction as the United States might, under the circumstances, well adopt," it now

appears, under the judgment of the Court of Claims, was not at all questionable, but was, on the contrary, an ascertained fact, definitely accepted; that is to say, with reference to *such "wives and children"* and other persons mentioned, "the United States *treated all* of these classes as "*prisoners of war.*"

Not having this crucial and adjudicated fact before him, and failing, in his analysis of the contract, to note the provision for the additional class of "*such other persons as may be designated by the Secretary of War,*" the learned Attorney General, in order to provide a rule of compensation by which the Secretary of War might be governed in his relations with the appellants, was forced to construe the words, "other persons" (which he seems to have been misled into taking out of the contract, without any regard whatever to their context or antecedents) as covering and including the "wives and children" in question; *whereas, by this finding of fact, it appears* that they are covered and provided for, *not as "such other persons* as may be designated," *but, in fact, as "prisoners of war"—the class for whose transportation both the Treaty and the contract primarily provide.*

Treating the "wives and children," however, as he did, merely as such "other persons," he found himself, as he conceived, compelled to group them with "enlisted men," and arbitrarily found no rule of compensation other than the third-class rate. He did not, it will be observed, enter upon any of the general considerations or arguments which we have advanced with reference to the unreasonableness, injustice and impropriety of such a construction of the contract, because involving the transportation of persons, who were naturally first-class passengers, in the third-class accommodations at third-class raes, but merely, without referring to any such considerations, and at the close of his long opinion, hastily slurred over the final question of compensation, by holding that the Secretary of War, under the classification "other persons," was *justified* in

paying to the appellants, for the transportation in question of such "wives and children," the *third-class rate* prescribed.

In this respect the Government and the Court below merely repeat the assertions of the learned Attorney-General, and, in so doing, deliberately ignore the actual phraseology and context of the contract, as we have shown in so great detail, as well as the general considerations derived from the surrounding circumstances, the practice of the parties, and the dictates of reason, common sense and justice, on which, in such cases, full stress must be laid.

Certain unimportant and immaterial findings of the Court below.

The Court of Claims saw fit, for reasons doubtless satisfactory to itself, to incorporate in its findings the statement that the *Steamship Company*, whose ships were employed to carry these Spanish prisoners, which had a long pre-existing contract with the Spanish Government for the return of persons, including officials and their families, from Spanish colonies to Spain, actually—

> "sent to the *Spanish Government* its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit, and the sums for which suit is now brought against the United States herein have all been settled and paid *by the Spanish Government* to the Compañía Transatlántica in Spain. *It does not appear* that the claimants, Ceballos & Co. have been obliged to pay the balances for which this action is brought, or any of said balances, to said Compañía Transatlántica, or that plaintiffs have incurred any liability therefor" (Rec., p. 26).

The absolute immateriality of this finding is apparent on its face. The appellants were powerless

to prevent its introductien, and there is no bill of exceptions running from the Court of Claims to this Court. The appellants were, of course, under no obligation in this case to explain their wholly independent relations with the Spanish Steamship Company in question, or with the Spanish Government. This is an action upon *an express contract with the United States.*

The suggestion of the finding is so utterly immaterial as to constitute a serious judicial error, which, unfortunately, the appellants, as we have said, were and are powerless to remedy. The appellants were not trying in the Court of Claims, and they could not there, and cannot here, be called upon to explain their relations with either the Steamship Company or the Spanish Government. If the Spanish Government has paid the Steamship Company, *non constat* but what it has *paid for the honor* of the appellants and, through them, of the United States, in view of the shocking injustice to which the appellants have been subjected; for, presumably, what they did not receive they could not pay to the Steamship Company. Certainly, the *United States*, after agreeing by *treaty* to provide this transportation "*at its own cost,*" will not now contend that *Spain* either could or should discharge that obligation. Accordingly, even if Spain had in fact paid for the transportation, *the independent contractual obligation of the United States to these appellants has not been discharged, or in any way affected thereby.*

As the finding puts it:

> "*It does not appear* that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is brought * * * or that plaintiffs have incurred any liability therefor."

It might better have been said, as we may say, on the contrary, that *it does not appear that* the appellants *may* NOT *be compelled* to pay the entire

balance for which recovery is sought in this suit. Both suggestions, however, are wholly immaterial, and must be disregarded in a consideration of the rights and interests of the parties under the provisions of this *express contract* now in suit.

Equally out of place and immaterial, under this *express contract*, were the findings that the United States did not assign accommodations; that the appellants did not make claim for such first-class rates when the wives and children went aboard ship (Finding X, Rec., p. 32); and that the same ships carried other passengers in addition to those carried for the United States (Finding XVIII, Rec., p. 38).

With these observations we dismiss this particular matter from further consideration.

SECOND POINT.

The Court below erred in refusing to allow the claim for 198 persons actually carried to Spain, merely because, as the Court erroneously assumed, they were not represented by so-called Quartermaster's requisitions.

The Court of Claims denied payment to the appellants for the 198 persons transported in the last fifteen shipments of prisoners and other persons from Manila to Spain, referring to them (Rec., p.35) as:

> "Making 198 persons in all, whose passages were not allowed for by the Auditor of the War Department, for the reason that they were not included in requests for transportation."

Again the Court states (Rec., p. 36):

> "The 198 persons now claimed for were not included in the count at *the time and place of embarkation.*"

And again (Rec., p. 37):

> "The evidence does not establish to the satisfaction of the Court that these 198 persons certified to by the American Consul at Barcelona were *prisoners of war*, entitled to transportation under the contract."

These three quotations state the grounds upon which the Court declines payment for the 198 persons.

The appellants insist that they are entitled to payment for these persons, for the reason that the Court has found that they were actually transported to Spain. It is utterly immaterial whether or not they were included in the count at the *time and place of embarkation*, and it is not for the *Court* to determine whether these persons were *entitled* to transportation under the contract. They were, in fact, transported by the appellants.

That these 198 persons were really transported from the Philippines to Spain is clear from the record. In Finding XV (Rec., p. 34), the Court says:

> "Of the last fifteen shipments of prisoners of war, running from Feb. 20, 1900, up to July 14, 1901, the list of passengers *shipped as shown by requests for transportation and Quartermaster's requisitions* (based on requests from the Spanish authorities) is as follows":

The Court then *specifies the number* of military officers, civil officials, etc., and gives a *total of 1,971* (R., 35). The Court further specifies (Rec., p. 35) that 184 of these are officers at $215 each, and 1,589 enlisted men at $73.75 each, making a total of 1,773, and states that the Auditor for the War Department made allowances for these 1,773 and disallowed payment for the 198 persons, because the Auditor for the War Department decided that they were not included in the requests for transportation. *The Court, however, disagreeing with the Auditor, has distinctly found, as shown by the above quotation, that they*

WERE INCLUDED, "as shown by requests for transportation and Quartermaster's requisitions," and the Court *finds the total of the number included in such requests for transportation and Quartermaster's requisitions at 1,971* (Rec., p. 35). *By adding 198, the number in controversy, to the 1,773 allowed by the Auditor* for the War Department, we have a total of *1,971*, which is *exactly the same total as the Court finds were included in the "requests for transportation and Quartermaster's requisitions* (based on requests from the Spanish authorities)" (Finding XV, Rec., p. 34).

The further statement made by the Court that—

> "The 198 persons now claimed for were not included in the count *at the time and place of embarkation*" (Rec., p. 36)—

is of no force and effect, in view of the fact that the Court had already ascertained and found as a fact that the method of counting the persons transported by the contract, to wit, by a representative of the United States and a representative of Ceballos & Company (Rec., p. 32), had been abandoned and superseded, and that—

> "The method of counting prisoners entitled to transportation under the contract was *changed* as to the last fifteen shipments, so that requests for transportation with reference to available space should be made upon the plaintiffs" (Rec., pp 35-36).

Clearly, therefore, it is of no moment whether or not these 198 persons were counted "at the time and place of embarkation," in view of the fact that the mode of counting prisoners entitled to transportation under the contract had been *changed* as to the last fifteen shipments, so that the number was to be ascertained by the "requisitions issued by the Quartermaster."

The last statement made by the Court (Rec., p. 37), to wit:

> "The evidence does not establish to the satisfaction of the *Court* that these 198 per-

> sons * * * were prisoners of war entitled to transportation under the contract"—

is wholly immaterial, in view of the fact that the Attorney-General, upon an official request from the Secretary of War, had decided—

> "That as between the contracting parties it *rested alone with the United States* to say who it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract" (Rec., p. 33, Finding XII).

Manifestly, therefore, it is not a question as to whether the *Court of Claims* is satisfied that these 198 persons were entitled to transportation under the contract. That question was not before the Court. That was *a matter for the United States authorities* at Manila to determine at the time they issued their requisitions for transportation upon Ceballos & Company, and Ceballos & Company were in such a position that they could not refuse to transport any person or persons tendered to them by the United States.

In the same opinion of the Attorney-General, officially given to the Secretary of War, it was held—

> "That it was questionable whether all the persons tendered and transported were not within the purview of the Treaty, but that this was a question *for the United States* authorities and *not for the carrier*, who would have been guilty, or might have been guilty, of a breach of his contract in refusing to carry persons designated to be carried by the United States" (Rec., p. 33, Finding XII).

When, therefore, the appellants furnished their vessels according to contract, and requisitions were issued for these 1,971 persons, and the whole 1,971 were transported, both of which facts are unequivocally found to be true by Finding XV of the Court of Claims (Rec., 34), it is wholly immaterial what the

"Auditor of the War Department decided," or whether these persons were counted "at the time and place of embarkation," or whether the *Court of Claims* regarded them as prisoners of war entitled to transportation.

It should be said, further, that, in addition to the requisition issued by the Quartermaster at Manila, based on the request from the Spanish authorities, as found by the Court (Rec., p. 34), the arrival of these persons at Barcelona is certified to officially by the American Consul at that port (Rec., p. 37). As to every one of these shipments, the American Consul certifies that—

> "*The following Spanish prisoners* have been furnished transportation from Manila, P. I., to Spain by J. M. Ceballos"—

and he then specifies the number of commissioned officers, the number of enlisted men, civilian officials, wives of officers and officials, and wives of enlisted men, &c., so that there cannot be any mistake as to the actual number transported and landed in Spain. The certificate of the American Consul at Barcelona, Mr. James G. Lay, in the form set out in the Record (p. 37) was given after the counting and landing of the prisoners from each of the fifteen last sailings, and he certifies to the transportation and landing of the full 1,971 (Rec., p. 36, bottom) whose transportation the Court finds in Finding XV (Rec., p. 34) was requested, and who were embraced in the Quartermaster's Requisitions on the request of the Spanish authorities.

THIRD POINT

If the construction of the contract, for which appellants contend, is rejected, then, since it appears that the "families"—"wives and children"—were actually "delivered" by the United States to the appellants for transportation, and were thereafter in fact transported in the cabins, the appellants are entitled to recover, upon a *quantum meruit*, a reasonable compensation for the service thus performed. In that view, the minds of the parties had met on everything except the compensation, which, however, may reasonably be measured by that stated in the contract for cabin accommodations, no other evidence having been adduced.

A recovery upon a *quantum meruit* may be had under the petition in the case at bar. There is no strict rule of pleading in the Court of Claims.

Clark vs. *U. S.*, 95 U. S., 539, 543.

If the construction of the contract between Ceballos & Company and the United States, hereinbefore contended for, is rejected by the Court, it still must be clear that the view of the contract set forth in the opinion of the Court of Claims cannot be sustained. It is equally clear, also, that the persons for whom the first class rate is demanded were actually *"treated" "as prisoners of war" by the United States and were actually delivered by it aboard ship and transported in the vessels supplied by the appellants* (Finding IV, Rec., p. 27; Finding XVIII, Rec., p. 38; and Finding I, last paragraph, Rec.,

p. 26; Finding X, Rec., p. 32). The Court finds that—

> "In performing the obligations of their contract, the petitioners supplied vessels with cabin accommodations and steerage accommodations, as had been agreed, and *in the cabins* were carried the officers, civil and military, *with their respective families*" (Rec., p. 32, Finding X).

The Secretary of War, in an official document directed to the Attorney General, sets forth his view of the contract, saying:

> "Under the terms of the Treaty of Peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the *rates of compensation for the transportation of such persons were not set forth in the contract*" (Finding XII, Rec., p. 33).

If the Court should concur in the view expressed by the Secretary of War (not concurred in by the Attorney General), then, as matter of law and justice, the appellants are entitled to compensation for the transportation of these persons, *thus actually delivered to them and carried*, at a *just and reasonable rate*, based upon the character of the accommodations furnished by the appellants and accepted by the United States in this transportation of its prisoners and other persons designated by the Secretary of War. The rate as fixed in the contract is $215 for cabin accommodations and $73.75 for steerage, and the rates were fixed after advertisement for bids issued by the Quartermaster of the Army, and after competitive bidding, so that these rates must be regarded as reasonable.

Again, if it be held that the phrase "other persons" can be wrested from the context and made to include all the people transported except actual soldiers, then we reply that, if this be true, the con-

tract expressly declares that appellants are to "provide third class or steerage accommodations, space and ventilation, for the enlisted men and other persons on board each ship"; and having complied with their obligation by providing steerage accommodations, if other and better accommodations were actually taken and used by the "prisoners of war," the appellants should be paid for the service the United States thus actually received. The United States "delivered" the persons on board ship, and knew their rank. The appellants did not, and had no authority to, assign the accommodations. They were mere carriers, acting solely under the direction and subject to the determination of the United States, which is now *bound to pay for the actual service rendered* by the appellants. So the Attorney-General has, as we conceive, in substance, expressly ruled and admitted.

23 Opin. Atty. Genl., at p. 17.

The appellants *furnished*, as required, *the cabin space*, and *that space was in fact occupied by these passengers of the United States—these "families."* That was an affair of the United States. They did not protest. *They must now pay for that space so occupied.* The authorities are quite to the point, and conclusive.

Even where the express contract with the Government is *void*, because resting in parol and not written, a plaintiff may recover the *value* of his services, for a complete or partial performance, "*as upon an implied contract for a quantum meruit.*"

> "*This value*, in the absence of any other evidence on the subject, *may be fairly assumed at what was stipulated for in the parol contract.*"
>
> *Clark* vs. *U. S.*, 95 U. S. 539, 542–543.

These observations are precisely applicable to the case at bar.

Here, the only real misunderstanding between the parties, as to the construction of the agreement, has

arisen with reference to the *rate of compensation* for the service *actually and properly rendered thereunder.* It is settled that—

> " *Where the parties contract* for the doing of certain work, *and the work is done, and accepted, and it appears that there was a misunderstanding as to the price to be paid for it, the law rejects the understanding of each, and awards reasonable compensation.*"
>
> *Turner* vs. *Webster*, 24 Kan., 38 (*headnote*, which perfectly expresses the decision).

In that case, the Court, speaking by BREWER, *J.*, and referring to the plaintiff's claim, said (at p. 40):

> " In other words, *the minds of the parties met upon everything but the compensation.* As to that, there was no *aggregatio mentium.* What, then, should result? Should he receive nothing, because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. *The law, disregarding both, says a reasonable compensation must be paid.*"

See also:

Goddard vs. *Foster*, 17 Wall., 123, at p. 141.

Fresh vs. *Gilson*, 16 Pet., 327, at p. 334.

Davis vs. *U. S.*, 120 Fed. Rep., 190, at p. 192.

FINALLY.

The judgment of the Court of Claims should be reversed, with instructions to enter a judgment for the plaintiffs for the amount due for the 198 persons carried and not paid for (payment to be adjudged in accordance with the contract rate for the accommodation actually provided), and for the sum of $215 for each wife and each child of all officers, civil and military, transported by the plaintiffs from the Philippine Islands, as found and described in the findings, first deducting all sums that may have been paid on account of such transportation, and for the sum of $215 for each other "prisoner of war" described in the fourth finding, who was actually furnished cabin accommodation, with a similar deduction for any sums actually paid on account of such transportation.

For a similar form of reversal, see—
Garrison vs. *U. S.*, 7 Wall., 688, 692.

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[The Attorney-General's Opinion is appended.]

ATTORNEY-GENERAL'S OPINION.

(23 OPIN. ATTY.-GEN'L, 9.)

Printed by Appellants for convenience of Court.

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*DEPARTMENT OF JUSTICE, *10
JANUARY 6, 1900.

SIR: I have the honor to acknowledge the receipt of your note of December 21, 1899, with its inclosures, in which you again ask my official opinion as to the propriety of a certain claim of J. M. Ceballos & Co., against your department arising out of a contract between the Secretary of War and J. M. Ceballos & Co. for the transportation of Spanish prisoners of war and others from the Philippines to Spain, in pursuance of the treaty of Paris.

In my note of the 20th ultimo, in reply to yours of the 13th, making a similar request for my opinion upon the same matter, I pointed out that, under certain rulings of my official predecessors, such questions as you present are, since the act of July 31, 1894 (chap. 174, sec. 8), properly addressed to the Comptroller of the Treasury, and should not be submitted to the Attorney-General, except in cases of great importance.

Your present note points out that this is a case of importance, and, further, that the questions involved a construction of the treaty of Paris, and the extent of the obligations resting upon the United States under that treaty, and which, *if decided one *11
way, may become the subject of diplomatic discussion between this country and Spain.

Accepting this as presenting a case exceptional to the general rule referred to, of my predecessors, and one coming within the exception stated in that rule, I willingly comply with your request for an opinion.

The questions presented in your notes have relation, chiefly, to the propriety of paying J. M. Ceball-

los & Co. for the transportation from the Philippines to Spain of certain non-combatants—wives and children of Spanish officers and soldiers, certain Spanish civilians, and their wives and children—and may be considered with reference to both the treaty with Spain and the contract of the War Department with J. M. Ceballos & Co.

The treaty of Paris, of December 10, 1898, Article V, paragraph I, provides that:

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them."

Article VI, paragraphs 2 and 3, are as follows:

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines."

"The Government of the United States will at its own cost return to Spain, and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisonors released, or caused to be released by them, respectively, under the article."

Strictly, there are three classes of persons for whose repatriation provision is thus made in this treaty, viz.:

FIRST.—"Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

SECOND.—"All persons made prisoners of war by the American forces."

THIRD.—"Spanish prisoners in the hands of the insurgents in Cuba and the Philippines," when released.

*But, so far as the treaty controls it, all these, *12
and all for whom any such provision is made, must have been, in some proper sense, prisoners—that is, held or deprived of their liberty by either the United States or the insurgents—for provision is made for no other. But, passing for the moment the expression "prisoners of war," it is not at all necessary, in order to their being prisoners within the meaning of this treaty stipulation, that these should have been combatants in any form. Our civil war, and most wars afford numerous examples of civilians taken and held as prisoners on account of war, and they are no less such, because non-combatants and unarmed.

Nor is it always necessary to their being such prisoners that their capture or detention be involuntary as to them. A wife or child may prefer to, and may follow the husband or father into captivity, and may share his imprisonment, to either its full or partial extent; still, while held and deprived of liberty by the opposing force, they may well be held to be prisoners, however voluntary may have been the original submission, just as voluntary hostages are prisoners.

And civilians, non-combatant, and unarmed persons may be, and often are, taken and held as prisoners in a war and because of it, and not for any other offense, and these are among the persons referred to in these treaty stipulations.

It will be noticed that the treaty, as above quoted, twice uses the term "prisoners of war." There are definitions, notably that in the Standard Dictionary, which limit the meaning of this phrase, "prisoner of war," to "a combatant or person in arms taken by the enemy, either by capture or surrender during a time of war." But I think this is too narrow a definition to express the modern meaning of the term, or its meaning as used in the treaty of Paris,

in that it excludes one who, though taking no actual part in the combat, and bearing no arms, may have been the directing head and governing hand of the whole conflict. Such a definition would make Jefferson Davis less a prisoner of war after his capture than was General Lee after his surrender.

Certainly the term was not used in this narrow sense in this treaty. This is obvious, for Article V, paragraph 1, provides that the United States shall
*13 send back to Spain all * "Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces." This, of course, embraces all armed combatants thus taken, and no further provision was required as to them; and no other provision would have been made, but that there were still other classes of prisoners not yet provided for, and for whom provision was made in Article VI, paragraphs 2 and 3, the first of which provides that "reciprocally, the United States will release all *persons* made prisoners of war by the American forces," "and will endeavor to obtain the release of all *Spanish prisoners* in the hands of the insurgents," and paragraph 3 provides for the return to Spain of all such prisoners as are thus released. Here are two classes of persons. The first are combatants, and clearly embrace all combatants who are here provided for. The second are as clearly persons other than combatants, and yet all are "prisoners of war" and are so described.

Now, if there were any soldiers or armed combatants thus taken and still held, not provided for in Article V, paragraph 1, they are included in Article VI. But the provisions of this article go also much further, and embrace "all *persons* made prisoners of war by the American forces," whether combatants or not. The fact that this provision is in an article separate and different from that providing for soldiers, and the change to a broader phraseology clearly express a broader meaning, and clearly show an intention to embrace persons other than combatants, and to include "all persons made

prisoners of war," whether combatants or not. It also clearly implies that the term "prisoners of war" was not intended to be restricted to actual combatants. This is further manifest from the stipulation that the United States will "undertake to obtain the release of all *Spanish prisoners* in the hands of the insurgents," without reference to whether they are combatants or not. Indeed, it is quite clear that the provisions of the treaty in this respect embrace non-combatant prisoners as well as soldiers.

This construction would be aided, if it were necessary, by the fact that it is difficult to perceive why a distinction should be made between different kinds of prisoners, based upon any real or supposed difference between a technical *prisoner of war* 14 and any other prisoner taken during war, and because of, on account of, and in the prosecution of war; and is the more readily adopted because the United States can afford and is disposed to adopt a liberal construction.

I am, therefore, of opinion that the treaty of Paris contemplates and provides for the repatriation by the United States of all prisoners captured and held by it, or held and released by the insurgents—soldiers or civilians, men, women, and children—and whether their detention was originally voluntary as to them or otherwise.

I do not consider the question whether, when in a foreign land, an officer or soldier is taken prisoner, his wife and minor children with him there, might not, under such a liberal construction of this treaty as the United States might well adopt, be considered as constructively prisoners also; or whether, on the other hand, it was intended that the officer or soldier should be returned to Spain, leaving his wife and children in the Philippines, because, as will be seen, when speaking of the contract itself, it is not necessary.

But does the question of paying J. M. Ceballos & Co. depend upon the treaty stipulations above

quoted? It appears that for the purpose of carrying out these provisions, the War Department entered into a contract with J. M. Ceballos & Co. by which that company agreed and bound itself to receive on shipboard, in the Philippines, and transport "such number of prisoners of war *and persons* as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain."

This company further agreed and was bound "to provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war *and such other persons* as may be designated by the Secretary of War, with cabin accommodations for all officers, and-third class or steerage accommodations, with ample galley accom-
*15 modations *space, and ventilation for the enlisted men and *any other persons* on board such ship."

And, for this service, the Secretary of War agrees to pay as follows:

"For the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215), and for each enlisted man, private soldier *or other person* designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75). * * * It is further agreed that the prisoners of war *and all other persons to be transported* shall be delivered by the United States on board the ship at such ports in the Philippine Islands as may be designated by the Secretary of War. * * * On account of the number of officers, enlisted men, *or other persons* to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos and Company, and payment to the said company shall be made *upon the basis of the number of officers, enlisted men, and persons counted on such ship.*"

From all this it is entirely certain that, under this contract, J. M. Ceballos & Co. had no control over or anything whatever to do with determining what persons, or how many should be thus received, subsisted and transported, nor in determining the class of such persons, as soldiers or civilians, nor in determining whether the persons so tendered for transportation came within any of the classes described in the treaty of Paris. The authorities of the United States only were authorized to decide this, and, with their decision, this steamship company had nothing to do, but was bound to receive and transport all who were thus tendered. And if that company has performed this service under this contract, the payment therefor cannot be made to depend upon the wisdom or correctness of that decision.

Assuming that the Secretary of War was authorized to make a contract for the return to Spain of the persons referred to in the Treaty of Paris, and, under that authority, made the contract in question here, and that this company has in good faith performed its part of it, the payment *there- *16
for cannot be affected by the fact, if it be so, that the agent of the United States, the Secretary of War, or his subordinates exceeded his authority by tendering for transportation some persons also who, as afterwards decided, did not come within the purview of that treaty. The United States had the right to adopt, as against itself, as liberal a construction of that treaty as it chose; and it was neither the duty of, nor was it within the province of this steamship company, a mere carrier, to question the wisdom, propriety or correctness of that construction. To say the least of it, it was questionable whether all the persons tendered and transported were not within the purview of the treaty, at least, under such a liberal construction as the United States might, under the circumstances, well adopt. And this was a question for the United States authorities and not for the

carrier, who would have been guilty or might have been guilty of a breach of his contract, and would certainly have put the Government to great trouble and expense had the company stopped the whole business of embarkation by an inquiry as to the proper construction of the Spanish treaty, and an investigation as to whether all the persons tendered came within its provisions. Nor is it probable, under the circumstances, and with the force there at its command, that the United States would have tolerated any such impertinence or delay.

Nor can it be said that when referred to the treaty, the contract was *ultra vires* the Secretary of War, as being applicable to persons not within the purview of that treaty, and of which said contractors were bound to take notice, for the contract, both in its preamble and terms, is for the transportation of prisoners only, and by no fair construction can it be made one for the transportation of other than prisoners, and was, therefore, within the treaty provisions. It is possible that persons who were not prisoners have been transported under it, but not because the contract provides for it. The contract, then, being legal and binding, the most that can be said, if even such be the fact, is that in the performance of that contract the United States authorities made a mistake and tendered for transportation some *persons not within the purview of the contract. But, as already said, it rested alone with the United States authorities to say who should be taken as prisoners, and as to which the carrier had neither voice, knowledge, nor means of knowledge, but was, by the express terms of this agreement, bound to carry all who were designated and tendered. When one contracting party requires of the other more than should be required, but which the other is bound to do, if required, and does it, it would be a novel rule which would permit the first party to refuse payment upon the ground that he ought not to have required so much.

*17

Even if some persons were tendered, and therefore transported, who did not come within the purview of either the treaty or the contract, this did not affect the validity of the contract, which, rightly construed, is one for the transportation of prisoners only, but was merely an error in performance, and one for which the United States authorities alone were responsible.

As between these contracting parties, it rested alone with the United States to say whom it would send back to Spain, and, in doing so, to alone determine who were prisoners and who came within the purview of the treaty or the contract. And having done this by its authorized agents, and compelled the carrier to accept such decision and perform the service thus required, it does not lie with the United States now to refuse payment upon the ground that it or its agents were mistaken and required more than they should have done.

I am therefore of opinion, that the United States should pay J. M. Ceballos & Co. the contract price for all of the persons so tendered, transported, subsisted, and delivered.

The remainder of your questions has relation to the price to be paid on account of "other persons" than officers, enlisted men, soldiers.

The contract speaks of "officers," "enlisted men," "soldiers," "prisoners of war," and "other persons." As to the officers and enlisted men, soldiers, there appears to be no question. For the former $215 and for the latter $73.75 *per capita* is to be paid. I think the word "officers" may *in- *18
clude as well civil as military officers, if there were any such held as prisoners and transported. As to the "other persons" transported, I think the construction of the contract is reasonably certain.

There are but two kinds of accommodations on shipboard provided for in the contract for all persons to be transported, viz., "cabin accommodations for all officers, and third-class or steerage accommodations, with ample galley accomodations,

space and ventilation, for the enlisted men *and other persons* on board such ship." And there are but two rates of price to be paid for this service, viz., for "such commissioned officers the sum of two hundred and fifteen dollars ($215), and for each enlisted man, private soldier, *or other person* designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75)."

These two rates of prices, the only ones for the payment of which the contract provides, are the only payments which can be made under the contract, viz., $215 for each officer, military or civil, and $73.75 for each person other than officer so transported.

Respectfully,

JOHN W. GRIGGS.

The Secretary of War.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, *Appellants,*
vs.
THE UNITED STATES.
} No. 108.

REPLY BRIEF FOR APPELLANTS.

AS TO THE ALLEGED LACK OF AMBIGUITY IN THE CONTRACT.

On pages 3 and 8 and on page 12 of its brief, the defendant states, as its principal point, that there is no ambiguity in the contract, and that, construction being unnecessary because the meaning is perfectly clear, the rules of construction referred to by the appellants are inapplicable.

On pages 6 and 7, the defendant admits the well-settled principles of construction for which the appellants contend in their principal brief, and admits that they would be applicable in the case at bar, if there

were, in fact, any ambiguity in the contract. The defendant simply denies the necessity for invoking these rules, saying:

> "We contend that no such ambiguity exists; that there is no necessity for going beyond the written agreement in order to interpret its meaning; that its provisions are clear; and the language used unambiguous and, under a reasonable construction, supports the judgment of the court below." (Defendant's Brief, p. 6.)

This present contention of the government is in conflict with the established facts and the obvious inferences from the lengthy opinion of the Court of Claims. The fact is, as stated in Finding XII (Rec., p. 33), that—

> "The *obligation* of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war, or political prisoners, was *questioned* by the American Secretary of War.
>
> "On December 18, 1899, the Secretary of War addressed an official letter to the Attorney-General, stating that under the terms of the Treaty of Peace, the *obligation* of the United States to send to Spain at its own cost the wives and children of officers, and soldiers, and civil prisoners, designated as officials, and their wives and children was *not clearly defined*, and that *the rates of compensation* for the transportation of such persons were *not set forth in the contract*, but in that connection *the Secretary requested an opinion* as to the *construction* of the Treaty of Peace in regard to the scope of the description of Spanish prisoners, *whether* and to what extent the Treaty included the re-

> patriation of *non-combatants* at the cost of the United States. The Secretary further *requested a construction of the contract rate of compensation* which might be allowed and paid per capita for each class of prisoners charged for under the contract with Ceballos & Company. On January 6, 1900, the Attorney General answered this official communication of the Secretary of War and *construed the contract* substantially as follows," as in said finding set forth.

The opinion of the Attorney General referred to in this Finding is appended to the appellants' principal brief (at pages 73 to 82). In view of the questions of construction thus raised by Secretary Root, himself an eminent lawyer, and considered with such exhaustive elaboration by the Attorney General, it is hardly open to the government now, for the first time, to contend, as to this contract, "that its terms are clear and unequivocal and therefore necessitate no interpretation other than found therein." (Defendant's Brief, p. 8). We do not think it necessary to comment further on this afterthought of the government, which is so utterly at war with the whole previous record in the case.

Whatever may have been the attitude of the defendant from time to time with reference to the want of ambiguity and the necessity for construction, it is perfectly clear, from the generality of the military terms used in the contract by the military authorities who were its authors, that it has failed to express with particularity and precision the actual and full meaning of the parties—a meaning which can be made clear only by a reference to and complete knowledge of the surrounding circumstances and conditions.

As to the Allegation That the Contract Speaks for Itself.

The defendant thereupon indulges in the assumption that the "contract speaks for itself" (Defendant's Brief, p. 8), but, as we have just shown, the contract has not heretofore been regarded by the Government as speaking for itself, but has, on the contrary, been treated as one requiring the most careful consideration and construction in order to arrive at the intention of the parties and the extent of the Government's obligations and of the appellants' rights thereunder. Indeed, it is important to note that, in the consideration of the obligations of the United States under the treaty and the contract, Mr. Root, the Secretary of War, pointed out to the Attorney General, and the Attorney General conceded and stated that—

> "this is a case of importance, and, further, that the questions involved a construction of the Treaty of Paris, and the extent of the obligations resting upon the United States under that Treaty, and which, if decided one way, may become the subject of diplomatic discussion between this country and Spain." (23 Opinion Attorney General, pp. 10, 11, Appellants' Brief, p. 73.)

Regarding it as a case of such relative importance, the Attorney General then proceeded, at great length, to discuss the construction to be placed upon both the Treaty and the contract.

As we have shown in our principal brief, however, if the contract can be regarded as speaking for itself, it is evident that it does not speak the language which the defendant now claims to find therein. Instead of considering the contract as a whole, which it is, of

course, absolutely necessary to do in every case, the defendant contents itself with a reference to isolated provisions, and almost exclusively to the paragraph relating to compensation and a portion of the paragraph relating to accommodations. The defendant entirely omits all reference to the prior and defining portions of the agreement, which set forth the plan and purposes of the contracting parties, while the appellants, on the other hand, have considered the entire agreement in all its parts and have demonstrated not only that it is consistent throughout, but that its *terms* negative the government's contention to the effect that the contract only—

> "provides for the transportation of the two classes which were contemplated in the advertisement and proposals," and that, so far as compensation is concerned, the "entire body of persons to be transported were divided by the contract into two general classes: the first class, clearly set forth as commissioned officers, $215, and all other persons to be repatriated, whether they were enlisted men, private soldiers, or other persons designated by the Secretary of War for such transportation, may be designated as the second class of this general division, the second class to be transported for $73.75 each." (Defendant's brief, pages 11 to 12.)

On the contrary, as we have shown, the contract, after quoting the 5th and 6th Articles of the Treaty—the latter providing for the release and return to Spain of *"all persons* made prisoners of war by the American forces" (a provision absolutely omitted by the defendant in the analysis on page 18 of its brief)—divides the individuals to be transported into two classes

—not those described by the Government as the result of a disregard of the terms of the contract, but—

FIRST: *"Prisoners of War."*

SECOND: "AND *such other persons as may be designated by the Secretary of War."*

These are the words of the contract, repeated, by way of antithetical classification, four or five different times in its different paragraphs.

"Prisoners of war," as the *first* class, are themselves divided, in the paragraph of the agreement providing for accommodation, into "officers" and "enlisted men"; and, in the paragraph relating to compensation a similar division is made of the class into "each commissioned officer," on the one side, and "each enlisted man" or "private soldier" on the other. In each instance, the *second* contrasting class is always referred to as "such other persons as may be designated by the Secretary of War," or "other person designated by the Secretary of War for transportation." In the paragraph providing for the delivery, aboard ship, of the persons to be transported, the language is, "the prisoners of war *and* all other persons to be transported." In each instance, the contrast and antitheses are always between two classes alone, *"prisoners of war,"* on the one hand, and *"other persons designated by the Secretary of War,"* on the other.

As we have repeatedly shown in our principal brief, Finding IV of the Court below (Rec., p. 27) has conclusively fixed the status and classification of the *"wives and children"* in question here as *"prisoners of war."*

Therefore, these "wives and children," under the very terms of the contract, were to be transported as "prisoners of war," and their transportation was to be paid for accordingly. They were not and cannot by

any forced construction of this contract be placed in the class of "other persons designated by the Secretary of War."

As we have pointed out with such elaboration in our principal brief, the class, "prisoners of war," under the contract, was divided by the Secretary of War and the military men in the Quartermaster-General's office, who prepared this contract, into two general classes only--"officers" and "enlisted men." And it is the very *generality* of this rough-and-ready military subdivision of the general class "prisoners of war"—among which, beyond any possibility of dispute, these "wives and children" are classed by Finding IV—which forces upon us the question of construction now under debate, and which, as appears from Finding XII (Rec., p. 33), raised the doubt in the mind of Secretary Root as to whether "wives and children" could be carried, and as to whether any rate of compensation had been provided in the contract for their transportation.

The defendant has referred to "a labored effort to distract the mind from the plain and clear terms of this contract" (Defendant's Brief, p. 12), but we have failed to find, in our own argument, anything which can even suggest a comparison with the labored effort of the defendant to *avoid* a construction of the contract, in its *entirety*, and more particularly of the really vital provisions thereof.

As to the Cuban Contract.

The defendant next considers (Defendant's Brief, pages 12-17), the Cuban contract, the appellants' motion in respect thereto, and the general provisions thereof.

As to the appellants' motion, the defendant con-

tends (p. 13), first, that the *record* fails to show that the appellants made any request to the Court of Claims for the findings referred to in their motion.

On this point, it is sufficient to say, that the *present* practice, under the rules of this court, does not permit the appellant to incorporate in the record requests for findings made in the court below. This is an unfortunate omission in the rules. The course of justice, in the consideration of appeals from the Court of Claims, is seriously obstructed by the lack of any provision or procedure by which requests to find, and exceptions to refusals of that court to find such requests, may be carried into the record and brought to this court under the usual bill of exceptions.

In *United States* vs. *Adams,* 9 Wall., 661, the court had before it a motion precisely like that which the appellants have submitted in the case at bar with reference to the introduction of the Cuban contract. Mr. Justice BRADLEY, in writing for the court and recommending the granting of the motion, pointed out that requests to find, followed by exceptions to the court's refusal to find such requests, ought to be provided for in the Court of Claims as a proper procedure, and that such a course might properly be prescribed by rules. Thereupon, and growing out of that decision, the fourth and fifth rules of this court, with reference to appeals to the Court of Claims, were formulated. (See 9 Wall., VII).

These rules and their history were again made the subject of comment by this court, speaking by Mr. Justice MILLER, in *Mahan* vs. *United States,* 14 Wall., 109-112. Unfortunately, however, in the revisions through which the rules of this court have passed, this Rule V, providing for such requests, refusals and exceptions, has been emasculated by the complete omis-

sion of that portion of the rule relating to such requests, refusals and exceptions in the record. In view of the comments of Mr. Justice BRADLEY upon the desirability and necessity for such a procedure in bringing questions before this court, we must assume that this omission of that provision, formulated and incorporated in the practice by him with such study and care, was wholly unintentional. However that may be, the provision no longer existing, we were forced to adopt the practice originally sanctioned, prior to the rule, in *United States* vs. *Adams, supra,* and, accordingly, made the pending motion for instructions to the Court of Claims to incorporate these additional findings as to the Cuban contract.

The court will see, however, that, under the existing practice, there was no possibility of making it appear in this record, as the defendant contends that we should have done, that the appellants in fact made a request to the court below for such findings.

For the same reason, the defendant's second contention (p. 13) that the "*record*" fails to show that the appellants filed any motion for a new trial, or made any application for amendments to findings, or additional findings, in the court below, is without force or significance.

The defendant's third contention (p. 13), that the appellants were lacking in due diligence in filing the motion, is of no special importance. The motion was made five or six weeks ago, long before the case appeared upon the day call, and the defendant had our principal brief six weeks ago, so that it cannot be contended or assumed that the defendant has been taken by surprise or has suffered any prejudice. As a matter of fact, due diligence on the part of the appellants required, for the convenience of the court and the par-

ties, that the motion should be presented in close connection with the argument of the case and its appearance upon the day call, in view of the bearing of the motion upon the merits.

The defendant's final contention (p. 13) that the additional findings with reference to the Cuban contract are immaterial, raises the only question which need be seriously discussed in this behalf.

Apart from what we have said in our principal brief on this last point, it is sufficient to say that the Cuban contract is simply a part of the same general transaction and subject-matter with the Philippines contract, that is to say, they both relate to the one transaction described in the treaty as the "return to Spain," from Cuba and the Philippines, of "all persons made prisoners of war by the American forces." That was the transaction. As we said in our principal brief, it merely happened that three contracts were required, all being between the same parties (the appellants and the defendant) and relating to this same subject-matter. The Cuban contract bore date July 21, 1898, the Philippines oral contract was put in operation November 7, 1898, and the Philippines written contract bore date March 4, 1899.

Under both the Cuban contract and the Philippines oral contract these "wives and children" were in fact carried in the cabins with their husbands and fathers without any question whatsoever as to the propriety of such accommodation.

Under the Cuban contract, equally without question, the defendant *paid* for such transportation of such "wives and children," in the cabins, with their husbands and fathers, at first class rates.

The "wives and children" of officers were thus carried in the cabins, under the Philippines oral contract,

in accordance with the practice established under the Cuban contract, merely upon a request from General Otis that he be permitted to send back to Spain, as desired by the Spanish general, all sick "Spanish *officers and soldiers*" (Finding V, p. 27), the "wives and children" of such "Spanish officers" thus being, in actual practice, classed with such officers in respect to accommodation.. The same practice was, of course, followed under the Philippines written contract.

On the question as to the amount of compensation to be paid for such accommodation furnished to these "wives and children" under this practice of the parties, under the Cuban and under both of the Philippines agreements, it is at once seen that the practical construction placed by both parties on the Cuban contract, in this respect, becomes vitally important, because, as we have said, under that contract the defendant in fact *paid* for these "wives and children," carried in the cabins, the first class rate required for cabin accommodation.

The defendant (Defendant's Brief, p. 15) refers to the propriety of this construction given to the Cuban contract. On that point there can be no debate in this court. It is not a question of proper construction. It is a question of the *actual practice and action* of the parties under that contract, with which we solely have to do.

We distinctly protest against the attempt of the defendant (Defendant's Brief, pages 15-16) to make it appear to this court that there were any "defects" in the Cuban contract, or any "question," for which, in the light of "experience," either Secretary Alger or any other government official wished to provide a remedy by changes in the similar provisions of the subsequent Philippines contract. There is no proof whatever that,

from the beginning to the end of the performance of the obligations created by the Cuban contract, any demand was made by the one side which was questioned by the other, or that any question, doubt or uncertainty arose as to the respective rights and obligations of the parties. On the contrary, as it is a matter of record, it cannot be denied that, without raising any question whatever, the defendant paid for the cabin transportation of officers "wives and children" at the first class cabin rates.

This attempt of the defendant in its brief to assert, by inference, that there was this doubt or defect to be cured in the subsequent Philippines contract is simply made the foundation for the further baseless assertion that in the written Philippines contract, for the purpose of curing such alleged defect and in order to cover and include such "wives and children," there was added to the classes of persons to be transported in the *steerage* these "other persons designated by the Secretary of War," meaning thereby, as the defendant claims, the "wives and children" of officers and other passengers actually carried in the cabin. It is true that this latter class of persons was not in specific terms provided for in the Cuban contract, and for the reasons, doubtless, which we have explained at large in our principal brief, that is to say, that conditions in the Philippines demanded provision for the transportation of disaffected and dangerous Spaniards, possibly not to be classed strictly as "prisoners of war"—a class of persons, as the court judicially knows, which did not exist in Cuba. There was no such disaffection in Cuba, and there was no such harmful Spanish element to be got rid of.

This Cuban contract and the action of the defendant thereunder, in paying for these "wives and children" of officers, are all matters of record in the War De-

partment. These facts were all used by the Government and by the appellants in the course of their arguments in the court below, and are, in fact, incorporated in the printed briefs and requests for findings filed in that court. We had, therefore, supposed that the defendant would permit, as a matter of course, and would not object to, the incorporation of these facts in this record.

AS TO THE ALLEGED PRIMARY OBLIGATION OF THE UNITED STATES TO REPATRIATE ONLY "SPANISH SOLDIERS" OR COMBATANTS AS DISTINGUISHED FROM NONCOMBATANTS.

On pages 17 to 19 of their brief, the defendant contends that the "primary obligation," if not the exclusive obligation of the United States, under the treaty as well as the contract, was to repatriate Spanish soldiers only, and not mere noncombatants. In other words, the provision of the treaty, concerning *"all persons* made prisoners of war by the American forces," is ignored. Indeed, it is to be observed that the defendant, at this point, *deliberately omits* all reference to this last class of persons mentioned in this clause of Article VI of the treaty—a clause which, for present purposes, is the most material and pertinent in the whole treaty.

The defendant's whole contention is based upon the fact that Article V refers to the return of "Spanish soldiers," and happens, as a mere matter of orderly sequence, to precede Article VI, the more material portion of which the defendant thus disregards. This extraordinary proposition, which would limit the "primary obligation" of the United States, if not its sole obligation, to the return of combatants, was most con-

clusively negatived by the learned Attorney-General, in the course of many pages of his elaborately considered opinion (23 Opinion Attorney-General, pp. 10-17, Appellant's Brief, pp. 73-81), and by the Court of Claims.

The Court of Claims said with much emphasis (Rec., p. 46):

> "*Undoubtedly* both parties to the agreement expected the repatriation to include *every person on the islands whom the United States regarded as prisoners of war.*"

The learned Attorney-General, after quoting both Articles V and VI of the treaty, said (Appellants' Brief, p. 76):

> "Here are two classes of persons. The first are combatants, and *clearly* embrace *all combatants* who are here provided for. The second are *as clearly* persons *other than combatants,* and yet *all are 'prisoners of war,'* and are so described."

And again, referring to the Article VI of the treaty:

> "The fact that this provision is in an article separate and different from that providing for soldiers, and the change to a broader phraseology, *clearly express* a broader meaning, and *clearly show* an intention to embrace persons *other than combatants,* and to include *'all persons* made prisoners of war,' *whether combatants or not.* It also *clearly implies* that the term *'prisoners of war' was not intended to be restricted to actual combatants.*"

And again the learned Attorney-General further says (Appellants' Brief, p. 77):

> "Indeed, it is *quite clear* that the provisions of the treaty in this respect embrace *non-combatant prisoners as well as soldiers.*
>
> "This construction would be aided, if it were necessary, by the fact that it is *difficult to perceive why a distinction should be made* between different kinds of prisoners, based upon any real or supposed difference between a technical 'prisoner of war' and any other prisoner taken during war, and because of, on account of, and in the prosecution of, war; and is the more readily adopted because the United States can afford and is disposed to adopt a liberal construction."

And so we might say, in this particular case, that the construction for which these appellants contend, which is so clearly supported by the very terms of the contract in question, should be "the more readily adopted, because the United States can afford, and is disposed, to adopt a liberal construction."

The Attorney-General finally concluded as follows (Appellants' Brief, p. 77):

> "I am, therefore, of the opinion that the Treaty of Paris contemplates and provides for the repatriation by the United States of *all prisoners* captured and held by it, or held and released by the insurgents—*soldiers or civilians, men, women and children*—and whether their detention was originally voluntary as to them or otherwise."

It will be remembered that thereupon the learned Attorney-General proceeded to say that the *contract* in the case at bar provided definitely for the transportation of wives and children and other civilians, and that the United States had adopted a liberal policy in executing the contract.

Surely, it is inconceivable that the United States, which has not appealed, can now reverse its position and ignore these utterances and admissions of the Attorney-General and the court below.

The error into which the Attorney-General fell was in failing to observe that the "wives and children" were treated as "prisoners of war," and that the "other persons designated by the Secretary of War" were an entirely different and contrasting class of persons. As between the appellants on the one side and the Attorney-General, on the other, there is simply that single point open, that is to say, were the "wives and children" classed as "other persons designated by the Secretary of War," or were they classed as "prisoners of war"?

Finding IV (Rec., p. 27) conclusively affixes to "wives and children" the status of "prisoners of war." If that fact had been before the learned Attorney-General it is evident that he must have agreed with the appellants in holding that, as "prisoners of war," and not as "other persons," the "wives and children" must be carried with their husbands and fathers, and must be paid for accordingly.

It is, therefore, most unfortunate for the appellants that the defendant should have adopted a very liberal policy in the matter of repatriation, and, subsequently, a very niggardly policy in the matter of the compensation therefor.

It is impossible to avoid mention of the somewhat peculiar suggestion, now persistently made by the defendant in its brief (page 19), that "there was nothing to prevent an officer making provision on shipboard for his wife and children and paying the extra compensation if he so desired." So, too, there was nothing to prevent any other human being, private soldier, monk,

nurse, or lady pensioner, or any citizen of the United States or Spain, from paying such additional compensation for any passenger so carried. The defendant—apparently without any diffidence—likewise suggests (Brief, p. 19)—

> "That the Spanish Government under its subsidy contract with the steamship company, paid the difference between the lower and higher rates for the transportation of the officers' 'wives and children,' thus recognizing its obligation in the premises, concerning which the United States had no part."

Here, again, the defendant ignores the question of its compensatory obligation under the terms of this contract. If the Spanish Government has chosen to pay to the steamship company, for the honor of the United States, what it conceived to be the compensation which the United States had agreed to pay, but which it had declined to pay, that certainly goes to the credit of the Spanish Government and entirely to the discredit of the United States. This is particularly so in view of the fact that the obligation assumed by the two Governments was mutual. No complaint is made that the Government of Spain did not return to the United States all persons released by the Spanish authorities in accordance with the terms of the treaty; nor is any complaint made that any one else was called upon to pay the obligation which Spain assumed in that matter; but now, when the United States has refused to pay its obligations for the return of the Spanish prisoners released by the United States authorities, it is claimed that the United States ought not to be forced to meet such obligations, because, forsooth, the Spanish Government, without any

obligation on its part, has paid what the United States agreed to pay.

Finally, on this point, inasmuch as the court below has found that these "wives and children" of officers were "prisoners of war" (Finding IV, Rec., p. 27), we find that that fact alone puts us in entire accord with the defendant, which concludes its argument on this point by declaring (Defendant's Brief, p. 19):

> "If appellants are correct in their contention, it necessarily follows that the 'wives and children' of officers must be considered as officers, and, therefore, 'prisoners of war.'"

They have been found to be "prisoners of war," as we have seen, and, in that event, the defendant apparently agrees with us, that they must, therefore, be "considered as officers," for the purposes of accommodation and compensation under the contract.

As to the Oral Philippines Contract.

The defendant (Brief, p. 20), as we have said, misconceives the argumentative use which we make of the Philippines oral agreement. We dwell upon that agreement, not as a precedent for the defendant's payment for these "wives and children" of officers at first class rates, but solely as conclusive evidence, through a continuous practical construction, of the intent and purpose of the parties that these "wives and children" of officers should be carried in the cabins with their husbands and fathers. As this was the practical construction, as well as the usage of the parties, under both the Cuban and the Philippines oral agreement, and as no change was made in that respect in

the Philippines written agreement, it continued to be their purpose and intent under that contract; and, inasmuch as that written contract contained no negative provision on this subject, it naturally follows that such cabin accommodation for such "wives and children" was to be paid for at cabin rates, because the unjust suggestion will hardly be made that the parties intended that these "wives and children" should be carried in the cabins and yet should be paid for only at steerage rates.

The fact that, when it came to the preparation of the Philippines written contract, the parties still continued to use the same general military terms "officers," on the one hand, and "enlisted men," on the other, is accounted for by two circumstances; first, that in view of the practical construction of the previous Cuban contract and of the Philippines oral contract, and of the usage of the parties thereunder, it had become unnecessary to make any change in those terms or any further particularization thereof, since the parties had accepted the construction that "wives and children" were to accompany their husbands and fathers, and the attention of the parties was not, accordingly, sharply drawn to this feature of the contract; and, secondly, that, in these closing days of the Spanish War, involving for many months thereafter the cleaning up of the debris of that war and the rearrangement and return of troops, the confusion and magnitude of the business in the War Department made it impossible to give to matters of detail of this kind that deliberate consideration which their importance would otherwise have demanded. Therefore, in the last analysis, we are thus confronted with the generality of these military terms, thus employed in these contracts by these military men of the Quartermaster-General's Office,

where the contract, through the original proposals, originated.

As illustrative of the same point, it must be borne in mind that the Government continuously delivered for transportation *"Civilian* officials," who were carried at cabin rates—$215—and yet they were no more to be regarded as "commissioned officers," as contradistinguished from "enlisted men," than were these "wives and children" of officers (See Rec., p. 37, Finding XVI). The weakness of the defendant's general contention is thus further demonstrated.

As to Defendant's Analysis of Appellants' Argument.

The defendant (on pages 21 and the following pages of its brief), while not pretending to follow the serious argument of the appellants, indulges in certain comments upon appellants' brief, which it is not necessary that we should follow. In its criticism of our classification, that is to say, that under the contract, following the treaty, the classes of persons who were to be carried were, first, *"prisoners of war,"* secondly, *"AND such other persons as may be designated by the Secretary of War"* (which, the court will remember, is the precise language of the contract employed in several of its principal clauses, including both the clause as to accommodation and the clause as to compensation), the defendant inquires (p. 23) as to where we find any mention of these "other persons designated by the Secretary of War," if they do not in fact include such persons as officers' "wives and children," civil officials and their families, civilians, priests, friars, nuns, nurses, sisters of charity, etc.

It would perhaps be sufficient for us to say that no question has ever been raised, as between the defendant

and the appellants, concerning the transportation, or the payment therefor, of *"such other persons as may be designated by the Secretary of War."* As to them, the appellants have never complained, and have been content to accept the classification of steerage rates. It naturally follows that the Court of Claims made no findings with reference to "such other persons," and could have made no such finding, since no question concerning them was before that court.

The defendant then makes the rash assertion (pages 23 and 24 of its brief) that "the record is as silent as the tomb concerning the repatriation of any such people" (p. 24), and that "none of the class mentioned are included therein." As we have said, it was not necessary that they should be grouped, because no distinct question was made as to such persons. It is also true that, in the view of the defendant, such persons were grouped with "enlisted men," paid for at steerage rates, and would naturally be found in that class. In framing the lists, therefore, the defendant, instead of adding "enlisted men and other persons," would naturally have simply added the words, "enlisted men," with whom these "other persons" were grouped. In the classification, however, in the schedule (Finding XVI, Rec., p. 37) the court will find a group of—

"78 civilians at $73.75.....$5,752.50."

Doubtless, many more such persons were grouped in the defendant's classification of "enlisted men," which, as we have said, in the defendant's view, so far as compensation was concerned, signified the same thing as "other persons." Certainly these "78 civilians at $73.75" could not have been classified under any other group prescribed by the contract except that of "such

other persons as may be designated by the Secretary of War," who were classed with "enlisted men" at steerage rates, and they were precisely the type of persons whom we have described in our brief as the riff-raff and flotsam and jetsam of Spain's population and the obnoxious persons and Spaniards of whom it was desired to rid the islands.

We fail to appreciate the force of the defendant's rhetorical facetiousness (Defendant's brief, pages 23 to 25) in the discussion of the appellants' serious and lawyer-like argument on this point.

On pages 24 and 25 of its brief the defendant suggests, as a fact, that there was and is no difference between the Spaniards in the Philippines and the Spaniards in Cuba, and that the appellants can derive no support from the argument based on the existence of a peculiarly dangerous and troublesome element in the Philippines. It is enough for us to say that, if there is any one historical fact better established than another, it is that the Spanish situation in the Philippines was wholly different from that in Cuba. In the first place, the Filipinos were a very different population from that of Cuba, and at once provided the United States with a hostile element and a hostile army to combat. In the second place, the Spanish element, long entrenched in the local and municipal governments of the islands, was distinctly different, in character and in its relation to the native population, from that found in Cuba. As the result, too, of the long Spanish occupation, there was an accumulation in the Philippines of many dangerous and undesirable elements. These are historical facts, and it would be a work of supererogation to comment further upon this suggestion of the defendant.

This objection which the defendant raises (Defen-

dant's Brief, pages 23-28) to the force and significance which the appellants attribute to the historical facts concerning the nature of the Spanish occupation and the character of the Spanish element in the Philippines, as surrounding circumstances calculated forcefully to aid the court in the construction of this contract, is quite in line with its objection to the introduction of the Cuban contract and the practice of the parties thereunder (all matters of record in the War Department), and indicates a carefully studied effort to exclude from the record and shut out from the court that light from surrounding circumstances which the court would ordinarily and naturally require in the interpretation of any such contract as that now in question.

On page 28, the defendant refers to the utterly immaterial finding by the Court of Claims (Rec., p. 32) to the effect that it does not appear that the United States assigned or designated cabin accommodations for officers' "wives and children," but that the evidence itself establishes that, when the "wives and children" went on board the plaintiff's vessels, the plaintiffs made no claim that the United States should pay for such "wives and children" at commissioned officers rates.

As to this, while we admit, as the defendant is so careful to state (Defendant's Brief 29), that we are absolutely at the mercy of the court below, for under the practice of this court, the finding is not "susceptible of change, variation, or obliteration," we have this to say on the subject: As we stated in our principal brief, the United States, like ourselves, is bound by the terms of this contract. Those terms do not require that the appellants should make any claim in respect to their compensation in any place other than "Washington, D. C." There, and there alone, are the

accounts to be presented and the payments to be made. (See, for instance, terms of Requisition, Rec., p. 36). The contract itself distinctly declares that the payments are to be made only upon evidence that the persons transported have been "delivered on shore in Spain." (Rec., p. 31.) Of course, therefore, it was not in order for the appellants to make any claim in the Philippines, under their contract in respect to the transportation of these "wives and children," or any other class of passengers. The appellants supposed that the defendant would conform to its contract obligations, and would pay for such persons thus carried in the cabins; and it was only at that prescribed time and place, and in the prescribed event, that the appellants could possibly learn that the defendant would refuse payment for such transportation. There was nobody in authority in the Philippines who could have responded to any claim which the appellants might have made at that time. Just as it would have been a "mere impertinence" (Appellants' Brief, p. 80), as the Attorney General has declared, for the appellants to have questioned the government's right to include any person whatsoever whom it tendered for transportation, so it would have been an equal impertinence, productice of delay, the possibility of which the Attorney General's opinion condemns, if the appellants would have undertaken to make and argue a claim on their part as to whether they should receive first class compensation for the "wives and children" carried in the cabins. It is inconceivable that any such claim could have been made in the Philippines. Certainly, no response on the part of the defendant could have been made there.

Then, too, it is quite immaterial that the United States did not expressly assign cabin accommodations

to these "wives and children." The contract itself provides that commissioned officers shall receive cabin accommodations. It also provides that "the prisoners of war, and all other persons to be transported shall be *delivered* by the United States on board the ships." (Rec., p. 31.) As set forth in Finding IV (Rec., p. 27) these "wives and children" were regarded and treated as "prisoners of war." The appellants, presumably, as well as the government, knew this fact, and, when the government tendered and delivered to the plaintiffs, for transportation, a large number of civil, naval, and military officers, and, accompanying them, the "wives and children" of such officers, and, when, indeed, the government specified, as it did in its requisitions for transportation made during the last fifteen shipments (see, for instance, Rec., p. 36) that "wives of officers and officials" and "children" were to be delivered for such transportation, we insist, as we did in our principal brief, that such tender and delivery and request, were in themselves the full equivalent of an express assignment of such "wives and children" to cabin accommodations with the officers, whom they accompanied, upon such delivery by the defendant aboard ship. It is inconceivable, in any civilized country, that the delivery and tender for transportation by governmental officers, acting under such a contract, of persons so circumstanced and travelling in such company, could receive any other significance than that which we attach thereto. When the defendant delivered such persons, in company with their husbands and fathers, it thereby, in effect, in terms demanded that they should receive accommodation with such officers, in the *cabins*, and, presumably, thereupon, *such* accommodation was to be paid for at the rates prescribed therefor. Certainly, *the burden was upon the defendant,* at

that time, and not upon the appellants, to speak out, and, if such persons were not to be carried where they naturally belonged, to insist that they should be carried in the steerage, or, in any event, at third class rates, if such was to be the defendant's contention.

As to the Appellants' Third Point, Concerning Recovery Upon a Quantum Meruit.

While, primarily, this is an action upon an express contract, as we stated in our principal brief, our third point supports the suggestion that, if need be, we may justify our recovery under a *quantum meruit*, in respect to the element of *compensation* to be paid for "wives and children." The defendant in its brief (pages 29 and 37-41) misconceives our position. The express contract is not ignored, even under the *quantum meruit* suggestion, but the minds of the parties, in that view, had not met upon the single question of the compensation to be paid. Everything else had been covered by the contract, except the compensation to be paid for these "wives and children," who were in fact carried in the cabins. We never depart from the express contract. The rule of compensation, prescribed by that contract for *cabin* accommodations, is conclusively applicable, under this point, to establish the reasonable compensation which, in this view, must be awarded for the transportation of these "wives and children." They were *in fact carried*, and nobody disputes the fact that *they had to be carried*. (See Attorney General's opinion and opinion of Court of Claims, Rec., pp. 46-47.) Compensation to the appellants at the cabin rate naturally follows, since there is nothing in the contract to negative that rate.

As to the Defendant's Criticisms Upon Appellants' Consideration of "Certain Unimportant and Immaterial Findings of the Court Below."

In our principal brief we have restrained ourselves within parliamentary limits in commenting upon the findings referred to. (See Defendant's Brief, pp. 30-31.) Whatever the provocation, it is not our purpose now to indulge in needless characterization. We must, however, even though the matter be utterly immaterial, comment upon the defendant's repeated references to statements, in the petition and elsewhere in the record, concerning the alleged *agency* of the appellants for the Spanish steamship line.

The defendant must have known that the Court of Claims itself, as the result of a consideration of the evidence, declared (Finding 1, Rec., p. 26) in referring to the *former* agency of Ceballos & Company for the steamship company—for *New York traffic*—that—

> *"their agency ceased at the breaking out of hostilities between the two countries."*

And the court thereupon proceeded to find, "that the contracts hereinafter mentioned were made between the United States and Ceballos & Company *alone*." (Finding 1, Rec., p. 26).

We know nothing about the defendant's alleged "twilight zone of agency" (Defendant's Brief, p. 31), but we do know that, in view of these findings of fact, the defendant must have known that there was not the slightest justification or excuse even for a suggestion that Ceballos & Company were the agents of the steamship company, or that the contract was in any sense made by them as such agents. Whatever prejudicial significance the defendant hoped this court might at-

tach to these inexcusable perversions of the record (on pages 30-31 of the defendant's brief), is certainly made impossible by this reference to the facts themselves.

As to the contention of the court below and of the defendant (pp. 31-32, Rec., pp. 46-47), that an allowance to the appellants would be paying for what Spain has already paid under her contractual relations with the Spanish Steamship Company, we fail to follow either that court or the defendant. The suggestion seems to be utterly immaterial, in any event, and especially in view of the fact that we are here dealing with an express contract.

As to the suggestion that our contention as to cabin rates for children, for instance, would involve charging full rates for such children, it is to be said that it is certainly true that, if such children are to be carried in the steerage at third class rates, as the defendant insists, they are also paying a *full* rate, even though it be third class. This is the established fact, and this is the *full rate* for children which both the Attorney General and the Court of Claims have insisted upon. Logically, there can be no difference, in point of principle, between a full first class rate and a full third class rate, for such children.

We have already commented upon the immateriality of the finding of the court in respect to these payments by the Spanish Government. Whatever Spain has seen fit to pay for the honor of the United States, and in fulfillment of its obligations under the treaty, can have nothing whatever to do with the extent of those obligations and with the construction which the court should give to the contract embodying them.

On this question of rates, it is important to bear in mind that, while, as both the Attorney General and the Court of Claims admit (Rec., p. 46; Appellant's Brief,

p. 82), the contract provides for only two rates, no half-rates being created for children, the court must know, that the rates for this particular transportation were in the nature of wholesale or reduced rates, which, in accordance with the general and well known course of business the world over, *never include half-rates*. Reduced or wholesale rates of transportation never permit such half rates. It is, therefore, natural that this contract should not have provided for any reduced rates for children. The rate itself, for this long voyage through the tropics, was so remarkably low as to give little, if any, net return to either the appellants or the steamship company. Of this, the court may take judicial notice.

The court below also points to the immaterial fact that other passengers were carried, in addition to prisoners. The court in this connection, will not forget that the steamship company was at liberty to use all of its *second* class accommodations, for the United States contracted for only the first and third class passages, and, further, that for the last fifteen shipments the defendant furnished only 1,971 persons for transportation (Rec., pp. 34-35, Finding XV), thus leaving ample space for other passengers.

As to Appellant's Fourth Assignment of Error, Concerning the Claim for 198 Persons Actually Carried.

As to this claim, the defendant is forced to admit (pages 33-37), that, in order to sustain its contention and objection, it must claim, and thereupon ask to *disregard, the plain finding* of the court below (Finding 15, Rec., pp. 34-37), on the allegation that this finding contains a so-called "*slight error*" (Defendant's Brief,

pp. 33 and 36), or as otherwise expressed with reference to the list of persons contained in that finding—on the ground, "that this list *erroneously* contains the 198 passengers."

In view of the conclusive nature here of an ordinary finding in the Court of Claims, which, as the defendant itself states (Defendant's Brief, p. 29), "under the practice of this court is not susceptible of change, variation, or obliteration," we may safely leave the defendant's argument to answer itself.

If there be any "slight error" in this Finding XV, or if there be any conflicting statements in that finding, upon which the defendant seems to dwell in its attempt to demonstrate the "slight error" to which it refers, that construction of the finding must be adopted which will be *most favorable to the appellants*, as the defeated party below coming now before this court in support of its appeal. This is the well-settled rule applicable to the consideration of appeals based upon Findings of Fact made by an inferior court. In other words, all conflicting or doubtful provisions must be resolved in favor of the appealing party.

Bailey's New Trials & Appeals (2nd Ed.), p. 357 and cases there cited.

The defendant's argument, based upon this alleged error has been sufficiently answered in our principal brief on this point.

AS TO THE JURISDICTION OF THE COURT OF CLAIMS.

We cannot follow the defendant's suggestion (Defendant's brief, p. 41) as to a possible want of jurisdiction in the Court of Claims. This action is upon *contract*, and has *nothing whatever to do with the*

treaty, which is *merely referred to as illustrative of the scope of the obligations*, which the United States had assumed towards Spain, and which it naturally undertook to fulfil through the medium of the contracts in question. In other words, as the Attorney-General points out with such exhaustive argument, these appellants, in their relation with the defendant, were bound, merely by the terms of their *contract*, to carry whomsoever the defendant tendered, and were not in any way concerned with the scope or meaning of the treaty. In short, the appellants' claim for compensation does not grow out of, and cannot be made to depend upon, any of the treaty stipulations between the United States and Spain. This question has been fully considered by this court and decided adversely to the defendant's contention.

U. S. vs. Weld, 127 U. S., pp. 51, 57.

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No. 108.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, APPELLANTS,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

J. M. CEBALLOS & COMPANY, appellants, v. THE UNITED STATES. } No. 108.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was brought in the Court of Claims to recover compensation alleged to be due appellants by reason of the repatriation of prisoners of war and other persons who were treated as prisoners of war from the Philippine Islands to Spain.

The principal questions to be determined are:

First. The right of appellants to recover for the transportation of the wives and children of Spanish officers at the rate paid for the repatriation of the officers.

Second. The right of appellants to recover for transporting 198 persons from the Philippines to Spain, who were not included in the Quartermaster's requisition for such transportation.

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The findings of fact as made by the court below are set forth at length in the record, pages 25 to 38, inclusive.

ASSIGNMENT OF ERRORS.

Appellants make the following assignment of errors:

First. The court erred in holding that the "wives and children" of Spanish "officers," civil and military, and other noncombatants, such as priests, nuns, sisters of charity, and lady pensioners, although actually "treated" by the United States authorities "as prisoners of war" (Finding IV, Rec., p. 27), were nevertheless embraced in that class described in the contract as "other persons designated by the Secretary of War for transportation," and that they were, therefore, to be paid for at the third-class rate specified in the contract, to wit, $73.75.

Second. The court erred in holding that the wives and children of the Spanish military and civil officers, the nuns, priests, sisters of charity, and other like persons, being in fact prisoners of war, as found by the court (Finding IV), were not properly and legally to be classed as "prisoners of war," and therefore to be paid for at the first-class rate specified in the contract, to wit, $215, when they in fact enjoyed first-class accommodations aboard ship.

Third. The court erred in holding that the wives and children of Spanish officers, civil and military, and other noncombatant prisoners of war, although transported as first-class passengers and afforded cabin accom-

modations aboard ship, were to be paid for at the first-class rate specified in the contract, to wit, $73.75.

Fourth. The court erred in holding that the appellants, Ceballos & Co., were not entitled to be paid for the 198 persons actually carried in the last 15 sailings of ships on the allegation that they were not covered by the quartermaster's requisition, although said persons were actually transported and delivered in Spain in accordance with the provisions of the contract.

Fifth. The court erred in holding that the balance due to the petitioners by the United States for the service rendered under the contract sued upon in this case is $5,391.25, whereas the court should have found that the balance actually due is $293,246.25.

ARGUMENT.

In their adroit and learned brief appellants' counsel assume that the contract in question contains doubtful expressions, is susceptible of different constructions, that the meaning is obscure, and, therefore, an examination of the circumstances, conditions, documents, and other matters is required in order to give a proper interpretation to the language of the contract.

The two principal issues here are: First, as to whether the Government is bound to pay for the repatriation of the wives and children of Spanish officials at the rate paid for the repatriation of commissioned officers, to wit, $215 for each of such per-

sons instead of $73.75. Second, as to whether the Government is bound, under its contract, to pay for the repatriation of the 198 persons not included in requests for transportation at the time of embarkation, as set forth in finding XV.

The specific provisions of the contract bearing upon these issues are clearly and unmistakably set forth as follows:

> The said J. M. Ceballos & Co. hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.
>
> The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third class or steerage accommodations, space, and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the company shall be equal in every respect to the United States Army garrison rations. * * *
>
> In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Co., for the transpor-

> tation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215) and for each enlisted man, private soldier or other person designated by the Secretary of War for transportation, the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men or persons have been transported, subsisted, and delivered on shore in Spain. * * *
>
> An account of the number of officers, enlisted men or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made upon the basis of the number of officers, enlisted men and persons counted on each ship.

Clearly, the contract provides for everything which the parties undertook to include therein.

The court below, in its opinion, in referring to the contract said:

> By its terms the higher rate was applied to officers only and the lower rate "for each enlisted man, private soldier, *or other person*." Thus there is nothing in the agreement and in the negotiations leading up to the agreement which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals and the acceptance of the same came to be exactly defined by a written contract.

If there is ambiguity with respect to the compensation for the different persons repatriated, or if there is serious doubt as to the meaning or as to the effect of the language employed in the contract, then the numerous citations of appellants' counsel, under the heading "The controlling principles of construction," are pertinent and applicable to the issues in this case. Therefore, any discussion of these legal principles, which are so well known and, indeed, which have in a large measure had their foundation in the opinions rendered by this court, is unnecessary and superfluous.

However, in order that these well-known principles may be applicable here, it is necessary first for the appellants to convince the court of their necessity; in other words, it is not sufficient to *assume* that the contract is not interpreted by its own terms.

Appellants must make clear that there is ambiguity, uncertainty, and expressions of doubtful meaning found in the language of the contract.

We contend that no such ambiguity exists; that there is no necessity for going beyond the written agreement in order to interpret its meaning; that its provisions are clear and the language used unambiguous and, under a reasonable construction, supports the judgment of the court below. The decisions cited by appellants do not change or modify the law, which is well settled, to the effect that a contract must stand or fall according to its terms as expressed therein.

Where the intention of the parties is deducible from the instrument, the principles of construction,

applying to obscure or ambiguous provisions, are as much out of place as if read into the decalogue.

Counsel for the respective parties, undoubtedly, differ materially as to whether the contract needs any further interpretation than that furnished by the language used within the instrument itself.

We do not differ as to the rules of construction, but as to the necessity of invoking these rules.

It is not necessary for the Government to cite an array of authorities in support of the doctrine that "where the language of a contract is clear and explicit the court will not attempt to construe it," and to the effect that "the courts may not make a contract for the parties, but that their function and duty consist in enforcing and carrying out the one actually made."

This doctrine has been expressed in many different ways and in a variety of arrangement of words and sentences. This court has established the principle in American jurisprudence, and when its application becomes necessary an array of authorities in support of the same would be but redundancy to the enlightened mind of this tribunal.

In *Calderon* v. *Atlas Steamship Company* (170 U. S., 278) Mr. Justice Brown used the following language:

> It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this

> principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. (Ib., 280.)

In the foregoing quotation may be found an epitome of the numerous decisions of this court upon the question of the interpretation of contracts.

We stand squarely upon the proposition that the instrument under consideration in this case, to wit, the Philippine contract, is the only one to be considered by the court, and that its terms are clear and unequivocal, and therefore necessitate no interpretation other than found therein.

THE CONTRACT SPEAKS FOR ITSELF.

The learned judge, in delivering the opinion of the court below, said:

> Thus, there is nothing in the agreement, and in the negotiations leading up to the agreement, which destroys the effect of the clause fixing the rate on the basis indicated by its language. Indeed, it would seem that the minds of the contracting parties met very clearly when the proposals, and the acceptance of the same, came to be exactly defined by a written contract.

> Undoubtedly both parties to the agreement expected the repatriation to include every person on the islands whom the United States regarded as prisoners of war. For plaintiffs now to claim that a rate equivalent to that bid for commissioned officers should be applied to their families would seem unjust to the Government, because the logical conclusion arising from such a contention would be a full rate for every child occupying cabin accommodations as first-class passengers, contrary to the rules and customs governing the transportation of children across the seas at a lower rate than adults. Inasmuch as the rate was not to exceed the sums indicated in the proposals, it is clear that the way was left open for a lower rate than that called for by the advertisement and the proposals in question. It is equally clear that when the parties came to make a contract they agreed that two rates should govern, and it then devolved upon plaintiffs to provide such quarters as should be safe and comfortable for all. Plaintiffs can not now be heard to say that the accommodations for those carried at the lower rate were not safe and comfortable, and before they can collect the officers' rate for the persons not entitled to cabin accommodations they must show that defendants imposed upon them the obligation to furnish more than it contracted to furnish. (Rec., p. 46.)

By reference to the advertisement for proposals (finding VII, Rec., p. 28) it may be seen that bids were invited for the transportation of two classes of persons, namely, officers and enlisted men, and

that cabin accommodations were required for the officers and third-class or steerage accommodations for enlisted men. In answer to the invitation for proposals for such transportation, appellants, through their duly authorized agent, recognized that there were two classes of persons to be repatriated, to wit, officers and enlisted men, and in making their proposal agreed to perform the service at a price not to exceed in any case—

For each officer	$215.00
For each enlisted man	73.75

The treaty of peace between the representatives of the Governments of the United States and Spain, of date December 10, 1898, provided in part as follows:

> The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.

And in Article VI, which reads as follows:

> Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.
>
> Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

> The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article. (Finding IX, Rec., p. 30)

The contract based upon the terms of the treaty provides for the transportation of the two classes which were contemplated in the advertisement and proposals, and it was agreed that appellants would provide comfortable transportation of the prisoners of war and such other persons as "may be designated by the Secretary of War, *with cabin accommodations for all officers, and third class or steerage accommodations, space and ventilation for the enlisted men and other persons on board each ship.*"

It was further agreed that appellants undertook the transportation, subsistence, and delivery on shore of such persons upon the following terms, to wit:

> For each commissioned officer..... $215.00
> For *each enlisted man, private soldier, or other person* designated by the Secretary of War for transportation..... 73.75
>
> the said sums to be due and payable upon evidence that said officers, enlisted men, or other persons have been transported, subsisted, and delivered on shore in Spain. (Finding IX, Rec., p. 31.)

In so far, then, as compensation is concerned, the entire body of persons to be transported were divided by the contract into two general classes; the first class, clearly set forth as commissioned officers, $215, and

all other persons to be repatriated, whether they were enlisted men, private soldiers, or other persons designated by the Secretary of War for such transportation, may be designated as the second class of this general division, the second class to be transported for $73.75 each.

No play upon words, no subtle or adroit attempt at construction, no labored effort to distract the mind from the plain and clear terms of this contract, should be permitted to inject therein ambiguity, obscurity, indefiniteness, or an element of doubt. The provisions stand out clear and forceful, clothing the entire instrument with the power of self-interpretation, and any other document or circumstance injected, in an attempt at more clearly elucidating the terms of the contract as now existing can but serve to becloud its unmistakable provisions.

THE CUBAN CONTRACT.

Appellants made a motion in this court for an order requiring the Court of Claims to make additional findings, setting forth therein the findings requested, in effect, to wit, that the court below be required to find that the Government had entered into a contract with the appellants for the repatriation of prisoners of war from Cuba to Spain, and also to find as to what compensation had been paid by the Government for such repatriation. To this motion and argument thereon filed by appellants the Government filed suggestions in opposition thereto on the grounds,

First. That the record before this court fails to show that appellants made any request to the Court of Claims for the findings as set forth in their motion;

Second. That the record before this court fails to show that appellants filed any motion in the Court of Claims for a new trial or that they made an application to said court to amend its findings or to make additional findings;

Third. Because the record before this court fails to show due diligence on the part of appellants in filing the motion herein; and

Fourth. For the reason that the additional findings which appellants required of the Court of Claims are immaterial to the consideration of the case by this court and have no bearing upon the final result.

These objections are supported in the brief filed by the Government, which need not be here reproduced.

Upon consideration of the motion this honorable court deferred its decision thereon until the whole case was presented on its merits. Notwithstanding this action of the court, appellants' counsel see proper to enter into a full discussion of the so-called "Cuban contract" and the payments made thereunder. The Cuban contract is mentioned some seventeen or eighteen times in their brief herein, and on pages 10 to 13, inclusive, a copy of the same is set forth.

We contend that this so-called "Cuban contract" has no place in the proceedings in the case at bar. Its provisions are entirely different, and relate to a different subject-matter. If these appellants have

any standing in this court, or in the Court of Claims, they must find its basis therefor in the Philippine contract, and not in the Cuban contract. It is with some serious doubt that we make any further mention of the terms of the Cuban contract in this discussion. Viewing the matter as we do, as having no proper place or legal standing in the case at bar, it would not appear seemly to enter upon a lengthy discussion of the terms of said Cuban contract or its fancied relation or imaginary connection with the contract which is the foundation of this suit. We, therefore, shall dispose of the Cuban contract by pointing out that its terms uphold and strengthen the Government's position in this case.

By reference to appellants' brief (p. 11), wherein the Cuban contract is set out, it may be seen that all of the troops of Spain that were surrendered by General Toral to the United States in Cuba were to be transported to such port in Spain as the Secretary of War might designate, and that the United States Government would pay for such transportation and for the subsistence and delivery on shore of "the prisoners, the sum of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for each officer so delivered." The contract further provides "that cabin accommodations are to be supplied for the said officers, and third-class or steerage accommodations, having suitable galley accommodations with ample space and ventilation, for the enlisted men or privates."

The term "other persons" was not mentioned in this contract and no provision was made for the repatriation of the officers' wives, children, or other persons. In the settlement made, however, with the War Department for transportation under this contract, it is contended by appellants that the Government paid for officers' wives and children at the same rate which the contract provides shall be paid for officers themselves, and appellants seek to introduce this circumstance as an important element in interpreting the provisions and terms found in the contract on which this action is based.

Whether a proper construction was given to the Cuban contract with reference to the payment for wives and children of officers is not a question to be litigated in this case. Whether the government officials paid a claim made under the Cuban contract which could not be enforced in the courts is not here for consideration; neither is the object nor purpose of paying the claim to be determined here. Whatever may have actuated the officials in making or interpreting the Cuban contract, one thing is clear and stands out prominently in this transaction, namely, that in making a subsequent contract with the appellants for the repatriation of the Philippine prisoners Secretary Alger did not leave the question of payment for the transportation of officers' wives and children open for speculation. He provided against claims being successfully made for such repatriation at the officers' rate by inserting the wise provision in the Philippine contract, which was not in

the Cuban contract, to wit, that the appellants should transport, subsist, and deliver on shore such persons to be repatriated at a compensation of $215 for each commissioned officer and $73.75 "*for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation.*"

The contract in question in this suit was made over six months after the Cuban contract. The Government officials had the benefit of their experience with these appellants, wherein they demanded under the Cuban contract the higher rate for transportation of officers' wives and children, and in the light of that experience Secretary Alger evidently determined that no such claim could be justly made under the contract providing for the repatriation of the Philippine prisoners. He therefore classed for the purposes of pay and compensation the persons to be repatriated into the two general divisions we have heretofore given, namely, commissioned officers in one class, and enlisted men, private soldiers, or other persons designated by the Secretary of War in the other class. The two contracts being different in vital particulars, the Cuban contract is of no practical aid to counsel or the court in construing the Philippine contract, especially in view of the clear and unequivocal language used therein. *If any aid is furnished it is to the extent that, in view of the defects of the first contract, provision was made in the second contract to cure such defects and to provide for a class of persons not designated in the Cuban contract.*

The doctrine of *judicandum est legibus, non exemplis* is as forceful now as at any other time during the history of jurisprudence. Appellants' counsel, however, ignore this principle in their search for precedents and examples for payment at the higher rate for repatriation of officers' wives and children.

THE PRIMARY OBLIGATION OF THE UNITED STATES WAS TO REPATRIATE SPANISH SOLDIERS TAKEN AS PRISONERS OF WAR.

The contract in question, we think, clearly differentiates between the class as combatants and noncombatants, and whether the designation "prisoners of war" was or was not intended to embrace "other persons," or "all other persons" or "such other persons as may be designated by the Secretary of War," is not important. By reference to the treaty it will be seen (Rec., Art. V, p. 30) that the United States agreed to send back to Spain, at its own cost, "Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces," thus indicating that the Government's conception of its duty, as expressed by the treaty, was to repatriate the combatant or soldier class, and in said Article V no other class is mentioned.

In Article VI of the treaty (Rec., p. 30) it is provided that Spain will release all "prisoners of war" and "all persons detained or in prison for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United

States." It is further provided in Article VI that the Government of the United States will, at its own cost, return to Spain prisoners released or caused to be released, respectively, under the treaty. It will thus be seen that the primary obligation of the Government was to repatriate "Spanish soldiers taken as prisoners of war" and applied particularly to the military or combatant class and not, as contended by the appellants, to the wives and children of the military officers.

It is possible there was some obligation on the part of the Government to repatriate the noncombatant class, but that obligation is not comparable with the primary one, which this Government assumed with reference to the repatriation of the military or combatant class.

In the contract, following the citations and quotations from the treaty, reference is made to the "transportation of prisoners of war" and "prisoners of war and other persons," but such expressions are not in any way inconsistent with the primary obligation of the treaty, namely, to send back to Spain the Spanish soldiers taken as prisoners of war.

The vital part of the contract is the clause fixing the compensation for the transportation of the various persons named therein, and its language seems to be simple, plain, and easily understood. The officers' wives and children were not assigned to any quarters or any part of the ship by the United States officials. The Government's duty was per-

formed under this contract and under the treaty when it delivered the parties to be repatriated to the vessels provided therefor, and there was nothing to prevent an officer making provision on shipboard for his wife and children and paying the extra compensation, if he so desired. The Spanish Government, under its subsidy contract with the steamship company, paid the difference between the lower and higher rates for the transportation of the officers' wives and children, thus recognizing its obligation in the premises, concerning which the United States had no part.

As a matter of fact, aside from the officers and soldiers, none of these people were bearing arms against the United States Government. They were in the Philippines, however, either as dependents of the officers and soldiers, or in some way connected with the former Government, or the church and through it with the state, and when it came to a matter of repatriation all were sent back to Spain by the United States in strict conformity with this contract; and for this purpose of repatriation they were all "treated as prisoners of war." However, when it comes to the question of payment for such repatriation then the contract provides for a classification, as heretofore seen.

If appellants are correct in their contention, it necessarily follows that the wives and children of officers must be considered as officers and, therefore, prisoners of war.

THE ORAL CONTRACT.

The oral contract which preceded the one reduced to writing was held by the Court of Claims to be in all respects identical with the written contract under consideration, and it was so agreed between the parties thereto.

Appellants contend that in this oral contract a precedent is found for payment by the Government or recognition of the right of appellants to demand payment at the rates here claimed. (Appellant's brief, pp. 30–31.) The facts, circumstances, and communications bearing upon the oral contract and upon the repatriation of such persons as were transported before the written contract was signed are fully set forth in the record. There is nothing in these negotiations or in the transactions thereunder to indicate that the Government bound itself in any way to pay for the officers' wives and children at officers' rates. In fact, no specific mention was made of officers' wives and children, and it is only by implication that they may be included in the language used in the correspondence which referred to "Spanish prisoners of war" and "sick Spanish officers and prisoners of war."

It may be true that the persons thus transported under the oral agreement were treated as prisoners of war, but when it came to the matter of settlement with the Government for this transportation a classification for payment was made on the basis contended for by the Government.

The proposals and appellants' bids do not seem to have had reference to noncombatants or nonmilitary class (Rec., findings VII and VIII), and no reference is made to any other class of passengers than officers and enlisted men. But when the contract was prepared and signed particular mention was made of "other persons" as contradistinguished from officers and enlisted men. This indicates clearly that it was in the minds of the contracting parties to include in the contract and make specific provision for those Spaniards who were in the Philippines, but who did not properly belong to the military class, although in a certain sense they perhaps might be designated as "prisoners of war." Hence such persons who were tendered to the steamship company and carried by it were properly designated as "other persons," thereby distinguishing them from the officers and enlisted men who had a military status.

ANALYSIS OF APPELLANTS' BRIEF OF ARGUMENT.

The learned counsel for appellants present their argument under three separate heads. We quote from their brief as follows:

POINTS.

FIRST POINT.

> It was clearly the intention of the parties to provide for the transportation from the Philippine Islands to Spain of two distinct classes—first, of all Spanish "prisoners of war," "and," secondly, of "such other persons as may be designated by the Secretary of War."

"Wives and children" were "treated" by both parties throughout "as prisoners of war," and not as "such other persons," within the description of the contract.

It is also equally clear that it was the intention of the parties that the "wives and children" in question should have precisely the same accommodations and be transported at the same rates as those provided for their husbands and fathers, who are classed as "officers," and the words of the contract must be so construed as to effectuate such intention.

On this point, the practical construction to this effect, placed by the parties upon the identical terms of the Cuban contract in this behalf—a contract between the same parties, concerning the same general transaction and subject-matter—and also upon the original oral Philippines agreement, is absolutely conclusive.

The Court of Claims, therefore, erred in sustaining the Government's contention, and classing officers' "wives and children" as "such other persons," who were entitled to only steerage accommodations, at third-class rates.

(Appellants' brief, pp. 14–15.)

Under this heading appellants' principal argument is to the effect that there were but two distinct classes of passengers intended to be transported under the treaty of Paris and the contract, as follows:

First. "Spanish prisoners of war."

Second. "Such other persons as may be designated by the Secretary of War."

This classification, appellants contend, is justified from the protocol, the treaty, the contract, the language used by the Court of Claims, the oral agreement that preceded the written contract in question, and by the so-called Cuban contract.

This search for "other persons" involves appellants in a somewhat extended argument. Whence are these "other persons" to come if they do not include officers' wives, children, civil officials and their families, civilians, priests, friars, nuns, nurses, sisters of charity, and all the lists so specifically set out in appellants' brief? Mention of them does not appear in the record. The Court of Claims failed to find any "other persons," except among those classed by appellants as "prisoners of war;" the military authorities of the United States also failed in this respect, and the accounting officers were equally unsuccessful, save only as "other persons" are embraced in the schedule as found by the Court of Claims. But appellants have discovered a class of persons which it is contended fall within the scope of the term "other persons," as used in the contract. These "other persons" are certain ecclesiastics and Spaniards who were constantly abusing and criticising the United States and who were supposed to be rendering valuable aid to the insurgent cause in the Philippines. Within this class of "other persons" appellants catalogue "Spanish editors," "Spanish influences," "ecclesiastical influences," "obnoxious persons," "ecclesiastical corporations," "bad Spaniards," "exploit-

ers," "riffraff," and finally "flotsom and jetsam of Spanish population." None of these are found in the record, but are taken from the writings of Aguinaldo, report of the Philippine Commission, report of Major-General Otis, newspaper editorials, and other sources. This court is asked to take judicial notice of the foregoing alleged persons, who are assigned by appellants as falling within the second division into which they have classified the various persons transported.

It is perhaps too much to assume that Aguinaldo was an altogether unprejudiced authority in respect to the estimate of either the reputation or character of individual Spaniards. It is significant that none of these persons characterized as "riffraff," "flotsam and jetsam," "bad Spaniards," "exploiters," etc., were transported or repatriated under the contract. The record is as silent as the tomb concerning the repatriation of any such people. Indeed, it precludes the possibility of any such persons having been repatriated, for the reason that it expressly sets forth who were transported under the contract, and none of the class mentioned are included therein.

If the Secretary of War thought to dispose of such undesirable persons and in the contract made a class therefor under the head of "other persons," as contended by appellants, he certainly failed in taking advantage of the terms of the contract with respect to their repatriation.

Appellants attempt to differentiate between the Spaniards in the Philippines and the Spaniards in

Cuba, but so far as the record shows, and from the history of the Spaniards in both islands, there is nothing to justify this attempt at differentiation. These comparisons of the Spaniards in the Philippines with the Spaniards in Cuba have no bearing upon the issues in this case, and we fail to find the purpose to be subserved by the court taking judicial notice of this so-called "dangerous element" in the Philippines. We therefore refrain from giving expression to our estimate of the individual characteristics of the Spaniards in both islands. The history of the Spanish occupation and government of those islands is written for all time, and, so far as we are concerned, appellants' counsel and the Spaniards who occupied Cuba may have all the comfort to be derived from the comparison drawn by appellants.

In their most able and learned brief appellants reach the culminating point in *finesse* and *technique* in arriving at their interpretation of that portion of the contract relating to the compensation for repatriation. As an illustration of this we take the liberty to quote as follows:

> The "wives and children" of "officers," both civil and military, were, presumably, of gentle breeding and refinement, and were doubtless, many of them, persons of a high degree of rank and culture. Spain, it will not be forgotten, is a monarchy of the old school, in which there persist, even to-day, with startling emphasis, the ancient aristocratic distinctions of rank between the different classes of the population. Many of the Philippines

civil and military officials, it is well known, were persons of rank and distinction. Spain had been in occupation of the islands for centuries, and, that long occupation now being brought to an end, the whole civil and governmental establishment—not merely the army of occupation—was to be returned to the mother country as "prisoners of war." There was the necessary accumulation, as a part of the ancient, aristocratic régime, of many officials, civil and military, of aristocratic rank, with their families. It might well have been that members of the royal family or household might have been caught in this predicament at Manila. Their situation would have been precisely the same as that of the President of the United States and his family placed in similar circumstances.

* * * * *

So, too, as we have heretofore intimated, it is absolutely unreasonable to impute to the parties an intention to separate and divorce husbands and fathers, the "officers" in question, from their "wives and children." In other words, where the "officers" were carried, there we must assume that the parties intended that their "wives and children" should be carried also. It could not have been intended needlessly to separate families on this long, hot, and dangerous voyage, especially families who were being carried to their homes in Spain. We may take it for granted that accommodations were dependent upon station in life and standard of living; that the dictates of humanity and the usages of civil-

ized society were to prevail; and that, if the father and husband was to be carried in the cabins, there it was intended that his wife and his children should follow him. So, again, if the husband and father was an "enlisted man," to be carried in the steerage, there, obviously, it was the intention that his wife and his children should likewise follow him.

The Government's contention necessarily involves such an imputation of intention thus to separate families, placing the more delicate and sensitive members, "the wives and children," in the steerage, in violation of all known usages and of all human feelings, and the husbands and fathers in the cabins. As we have said, this is wholly unreasonable and unnatural, especially in view of the character of the voyage in question, and the quantity of filth, and the utter degradation of the personal associations, in the average steerage accommodations. (Appellants' brief, pp. 47, 48, 49).

Again quoting from appellants' brief:

> It seems to us to be a most unworthy argument to suggest that because the United States did not specifically assign accommodations it is not bound to pay therefor under an *express contract* like that in question. We are *not* suing upon a *quantum meruit*. (Ib., p. 54.)

We beg leave to suggest that this case is not being tried on either sympathy or sentiment. It has its foundation in the Philippine contract and in no other. The "ancient aristocratic distinctions of rank" are not recognized in the contract, neither was the

agreement prepared with reference to any particular "persons of a high degree of rank and culture." It was not prepared with the view of comporting with the rules, regulations, and court etiquette of the ancient Kingdom of Spain. Active warfare had ceased and, in accordance with the protocol between the two countries, the United States authorities attempted to faithfully carry out the treaty in entering into the contract. They provided for comfortable and safe transportation and subsistence for the officers at $215 and the enlisted men and all other persons at $73.75 each. The contracting parties did not consider the question of royal privileges.

The Court of Claims expressly found as follows:

> If any persons other than officers were given cabin accommodations, the United States did not assign or place such persons in the steamers' cabins.
>
> *It does not appear* from the evidence in the cause that the United States assigned or designated cabin accommodations for the commissioned officers or the wives and children of the commissioned officers.
>
> *The evidence does establish* to the satisfaction of the court that when the wives and children of the military and civil officers of the Spanish army in the Philippine Archipelago went on board the plaintiffs' vessel the plaintiffs made no claim that the United States should pay for the wives and children of such commissioned officers at commissioned officers' rates. (Rec., p. 32, finding X.)

This finding, we may assume, was made by the court after considering all the evidence presented and all the statements of the circumstances connected with the transaction which were admissible in evidence. It is a proper finding, and under the practice of this court is not susceptible of change, variation, or obliteration by appellants' microscopic analysis.

The statement quoted from appellants' brief (p. 54), to the effect that they are not suing upon a *quantum meruit*, but upon an express contract, does not seem to be in accord with their statement found on page 68 thereof, which reads as follows:

THIRD POINT.

> If the construction of the contract for which appellants contend is rejected, then, since it appears that the "families"—"wives and children"—were actually "delivered" by the United States to the appellants for transportation, and were thereafter in fact transported in the cabins, the appellants are entitled to recover upon a quantum meruit a reasonable compensation for the service thus performed. In that view the minds of the parties had met on everything except the compensation, which, however, may reasonably be measured by that stated in the contract for cabin accommodations, no other evidence having been adduced.

On page 62 of appellants' brief they use the following language:

> *This is an action upon an express contract with the United States.*

We agree with appellants in this statement, but leave to them the necessary explanations as to the theory upon which they can possibly recover under a *quantum meruit*.

APPELLANTS' ATTACK ON THE FINDINGS OF THE COURT.

Appellants attack the findings of the court under the head of "Certain unimportant and immaterial findings of the court below." (Appellants' brief, pp. 61–63, inclusive.)

The findings which the plaintiffs term "unimportant and immaterial" were made on the evidence which supports these findings, and it may well have attracted the attention of the court, especially in view of the remarkable admission found in the record (p. 1) wherein it is stated that appellants "were and are the American operators of the Spanish Transatlantic Line of steamers engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands, upon the vessels of which all the repatriated Spanish prisoners were transported from the Philippine Islands to Spain."

Again, in answering the advertisement of General Luddington, appellants, through their agent, stated:

> SIR: In accordance with the advertisement of Gen. M. I. Luddington, Quartermaster-General U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañia Transatlantica de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. (Rec., p. 5.)

These quotations, as may be seen, are taken from the plaintiffs' petition filed in the Court of Claims, August 15, 1903. And in the second amended petition, filed October 31, 1903, the proposal of Ceballos & Co., is again set forth through their agent , as follows:

> I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañia Transatlantica de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. (Rec., p. 16.)

Were it proper so to do, we would gladly accompany appellants in an investigation and analysis of the testimony which the court found to support the findings which appellants say are "unimportant and immaterial."

The admissions of appellants, their proposal in answer to the Government's advertisement, and the findings of the court bring them within the twilight zone of agency and so intimately connect them with the steamship company that some emphasis may be placed upon the following finding of the Court of Claims:

> The Compañía Transatlántica sent to the Spanish Government its bill made in accordance with the rate fixed in its contract for the certain transportations which are now claimed in this suit; and the sums for which suit is now brought against the United States herein have all been settled and paid by the Spanish Government to the Compañía Transatlántica in Spain. It does not appear that the claimants, Ceballos & Co., have been obliged to pay the balances for which this action is

> brought, or any of said balances, to said Compañía Transatlántica or that plaintiffs have incurred any liability therefor. (Rec., p. 26.)

The first finding of fact (Rec., p. 25) shows the contractual relations which existed between the Compañía Transatlántica Steamship line and the Government of Spain, and in the opinion of the court (Rec., p. 47) may be found the very significant language:

> Assuredly plaintiffs ought not to expect a judgment in their favor for the part paid by Spain to the Compañía Transatlántica for coming into the matter to make more easy the journey to the peninsula for the women and children. In no event are plaintiffs entitled to anything for the service performed by others and paid for by Spain with neither compulsion nor request.

The invitation for proposals contains the statement "The United States Government will deliver the prisoners on board the vessels at Manila." The Government's duty was discharged on delivering the prisoners on board the various ships and, as found by the Court of Claims, the government officials did not assign the persons transported to either the cabins or steerage. Appellants had the disposition and location on the ships of those repatriated. It would, therefore, seem an unusual proceeding to permit them to select any number they might choose in addition to "commissioned officers" for cabin accommodations to be paid for at the higher rate.

FOURTH ASSIGNMENT OF ERROR.

For their fourth assignment of error appellants allege:

> The court below erred in refusing to allow the claim for 198 persons actually carried to Spain merely because, as the court erroneously assumed, they were not represented by so-called "quartermaster's requisitions." (Claimants' brief, p. 63.)

The court found as a fact that these 198 persons for which appellants now insist upon payment for repatriation were not represented by quartermaster's requisitions. The method of counting those entitled to transportation under the contract was changed in the last fifteen shipments, so that the requests for transportation with reference to available space should be made upon the appellants, and thereupon a requisition for transportation be issued by the United States quartermaster at Manila. (Rec., pp. 35, 36.) The full circumstances of the shipment of these 198 persons are set forth in finding XV of the record.

The appellants, however, claim to have found a slight error in the table appearing on pages 34 and 35 of the record, and from this error they question the authority of the court to state that these 198 persons were not included in requests for transportation. The error is immaterial and arises as follows:

In Finding XV (Rec., p. 34) the entire list of passengers (for whose transportation appellants hold the United States responsible) embraced in the last 15 shipments are included in one finding and one table,

making (of all classes) 1,971 persons. This finding is headed as follows:

> Of the last 15 shipments of prisoners of war running from February 20, 1900, up to July 14, 1901, the list of passengers shipped as shown by requests for transportation and quartermaster's requisitions (based on requests from the Spanish authorities) is as follows:

Then follows the list embracing the various classifications; in fact, all the passengers carried on the 15 vessels, and for whose passages the Government was by the appellants held liable.

This list erroneously contains the 198 passengers for which the Government refused to pay, because (1) not included in requests for transportation; and (2) not counted at the time of embarkation, as required by the contract.

That the inclusion of these 198 persons in the list contained in Finding XV is plainly an error is conclusively demonstrated and corrected in a later portion of the same finding wherein it is stated (p. 35), after giving the full list of 1,971 persons covering the last 15 shipments:

> Upon the above shipments the Auditor of the War Department made the following allowances:
>
> Officers (which included civil officials of the class of military officers), 184, at $215 each.
>
> Enlisted men and other persons, 1,589, at $73.75 each.
>
> And disallowed payment for the following persons because not called for and not in-

> cluded in requests for transportation of the claimant company at the time of embarkation.

Here follows the list which totals 198.

Next following this statement in the same finding:

> Making 198 persons in all whose passages were not allowed for by the Auditor of the War Department for the reason that they were not included in requests for transportation.

Later in the same finding (p. 36) occurs the statement:

> The 198 persons now claimed for were not included in the count at the time and place of embarkation.
>
> No objections were offered at the time of the charge in the method of computing the number of persons to go aboard by the plaintiffs.

The accounts presented to the Treasury for payment asked compensation for 198 persons, according to a certificate in form and figures set forth in finding 15. (Rec., p. 37.)

This is referred to by the court as a form of requisition for transportation used on the 14 ships besides the *Leon XIII*, but on different dates, "according to the time of sailing, and embraced officers, enlisted men, and other persons on which the count was made."

Following this appears the statement (p. 37, finding XV):

> The evidence does not establish to the satisfaction of the court that these 198 persons

> certified to by the American consul at Barcelona were prisoners of war, entitled to transportation under the contract.

But if any doubt lingered as to this matter, that doubt is dispelled by finding XVII (Rec., p. 38), which states:

> The total number of prisoners of all classes delivered by the United States aboard ship for which there were quartermaster's requisitions and transported by the petitioners, in accordance with the two contracts (one of which was oral and the other of which was in writing, and set forth herein) was 17,305—that is to say, 1,938 military and naval officers and 15,367 enlisted men and other persons.

The latter statement, excluding as it does the 198 persons whose passage was not allowed by the auditor because not included in the requests for transportation and not counted at the time of embarkation, makes the meaning of the Court of Claims perfectly clear, notwithstanding the slight error which crept into its finding.

Whatever the method of counting may have been prior to the last 15 shipments, the counting as to those shipments was strictly in accordance with the terms of the contract, which reads as follows:

> The account of the number of officers, enlisted men, and other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of said J. M. Ceballos & Co., shall be made upon the basis of the number of

officers, enlisted men, and other persons counted on each ship.

The clear and lucid argument in the opinion on this branch of the case is all that need be urged on behalf of the Government. (Rec., pp. 23, 24.)

THE DOCTRINE OF QUANTUM MERUIT WITHOUT APPLICATION.

As heretofore stated, the third contention is that appellants are entitled to recover upon a *quantum meruit*, which claim we think entirely inconsistent with that made by appellants, to which we have referred in another portion of this brief. But the doctrine of *quantum meruit* is not applicable in this case, as clearly pointed out by the court below in the following language:

> The cause of action is on the express contract embracing all repatriations undertaken. There is nothing in the transactions of the parties outside of the express agreement to indicate that compensation for any service to be performed by plaintiffs was contemplated, or that they could perform any service which should be paid for on a different basis than that expressed in the writing. There is, therefore, no room to invoke quantum meruit. As said in *Hartman* v. *United States* (40 Ct. Cls. R., 133), "the express written agreement excludes the possibility of implied contract;" and that the minds of the parties met when they formulated their written agreement for the lower rate to include women and children seems clear from the prevailing conditions to be

> gathered from the official correspondence, which shows that early doubts existed as to who were to be regarded as prisoners. But the parties proceeded upon the assumption that civil officials and women and children were to go and constructed their agreement accordingly. * * * The repatriation of women and children alone involved an expenditure of several hundred thousand dollars by this Government, and as the matter stands it seems just for it to end. (Rec., pp. 46, 47.)

It has been frequently held by this court that a claim can not be supported upon an implied promise where the record shows the express contract to be in full force and operation. In *Hawkins* v. *The United States* (96 U. S., 967) Mr. Justice Clifford, speaking for the court, said:

> Express stipulations can not in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned or has been varied by the consent of the parties. Hence the rule is that if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done or for money paid must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he can not recover under such circumstances upon a *quantum meruit*. (1 Story, Contr. (5th ed.), sec. 18; *Selway* v. *Fogg*, 5 Mees. & W., 83; *Creighton* v. *City of Toledo*, 18 Ohio St., 447; *Weston* v. *Davis*, 24 Me., 374,

Whiting v. *Sullivan*, 7 Mass., 107; *Merrill* v. *The Ithaca and Owego Railroad Co.*, 16 Wend., 586; *Glacius et al.* v. *Black*, 50 N. Y., 145.)

When a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it he may be made liable upon an implied promise to make reasonable remuneration in respect to such work. (*Burns* v. *Miller*, 4 Taunt., 745; *Inchbald* v. *Plantation Company*, 17 C. B. N. S., 733; *Bartholomew* v. *Markwick*, 15 C. B. N. S., 711; Addison, Contr. (6th ed.), 23.)

Implied promises or promises in law exist only when there is no express promise between the parties—*expressum facit cessare tacitum.* Hence, says Chitty, a party can not be bound by an implied promise when he has made an express contract as to the same subject-matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. (Chitty, Contr. (10th ed.), 62; *Toussaint* v. *Martinnant*, 2 T. R., 100; *Cutter* v. *Powell*, 6 id., 320; *Ferguson* v. *Carrington*, 9 B. and C., 59; *Atherton* v. *Dennett*, Law Rep., 7 Q. B., 327.)

Applying this doctrine to the case at bar, it would seem that the claim based upon *quantum meruit* is without support. The express contract had not been abandoned. It was alive and recognized as in active operation by both parties thereto, and in the whole record there does not appear the slightest basis upon which to rest a reasonable contention for

recovery upon any ground other than is contained in the written agreement.

The court below found nothing in the transactions outside of the express contract to indicate that the Government was obligated to pay for any service on a different basis than that expressed in the contract, and this agreement, this *aggregatio mentium*, forever closed the right of appellants to recover under the doctrine of *quantum meruit*.

From the viewpoint of Government's counsel appellants seek to reverse the universal rule governing the interpretation of contracts, namely:

First. That the primary object is to comprehend the intention, understanding, and agreement of the parties to the contract; and

Second. That this intention must, if possible, be ascertained from the instrument itself.

If the rule is to be reversed and every circumstance and statement, however remote, taken into consideration in connection with the clear and express terms of the contract, then no contract can be prepared with certainty or precision. Agreements in writing between parties, however explicit, clear, and concise the verbiage used therein, can be rendered ambiguous, uncertain, vague, and meaningless by foreign writings, expressions, circumstances, and conditions remotely adverting to the subject-matter in which the contract finds its inception.

We do not believe the courts will yield in the slightest degree to this recession from the well-recognized rules governing the interpretation of

written agreements. This court is the highest authority for these well-established principles and, in the application of the law, has always sustained the maxim *Contractus legem ex conventione accipiunt.*

The express terms of the contract in question are sufficient within themselves to apprise the court of the agreement and intention of the parties, and the law applicable to the contract finds its inception in the nature of the instrument.

We think the United States Government has faithfully discharged the obligation resting upon it under the terms of the contract.

HAS THE COURT OF CLAIMS JURISDICTION?

In the act providing for the jurisdiction, powers, and procedure of the Court of Claims may be found the following section:

> SEC. 1066. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.
>
> (Revised Statutes of the U. S., 2d ed., p. 197.)

Does this claim grow out of the treaty between the United States and Spain, commonly known as the treaty of Paris, within the scope of the statute just quoted? The Court of Claims (Rec., p. 44), in its opinion, states that it does not.

The question of jurisdiction, of course, may be raised and considered by counsel at any stage of the proceedings, or may be considered and determined by the court itself without the matter having been suggested by counsel for either party. Throughout the record, as we have heretofore shown, there is abundant evidence of close relations between the Government of Spain in entering into its so-called subsidy contract with the Compania Transatlantica Steamship Line. Indeed, Finding I shows that these relations existed between the Government of Spain and the steamship company beginning in 1887 and not ending until 1907. The record, furthermore, as we have seen, intimately connects these appellants with the steamship company. It is by reason of the treaty and its terms that the contract in question ever had any existence, and if we give the ordinary construction to the statute quoted, there may be a serious question as to the jurisdiction of the court below to hear, consider, and determine the matters in issue in this case.

JOHN Q. THOMPSON,
Assistant Attorney-General.

FRANKLIN W. COLLINS,
Attorney.

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J. M. CEBALLOS & COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 108. Argued March 10, 1909.—Decided May 17, 1909.

Where a contract requires construction as to the mode of its performance, a similar contract in writing between the same parties which had been fully performed prior to the execution of the contract to be construed, serves, within proper limitations, to throw light upon the construction of the later contract and may be referred to for that purpose.

A contract having been made by the United States with Ceballos & Co. for the repatriation of the Spanish prisoners in Cuba after the Spanish war, similar in terms to another contract subsequently made with the same parties for the repatriation of the Spanish prisoners

in Manila, providing certain accommodations for officers and steerage accommodations for men and other persons designated by the Secretary of War, the fact that in the performance of the Cuban contract the wives and children of the officers were given similar cabin accommodations to those of their respective husbands and fathers, and the United States had paid therefor the higher rate, *held* to be material in construing the Philippine contract and also *held* that Ceballos & Co. were entitled to payment for the transportation of the wives and children of officers at cabin rates.

The same contract construed as entitling Ceballos & Co. to half rates of cabin transportation for children under ten, and steerage rates for the "other persons designated by the Secretary of War," that expression not embracing wives and children of officers, but embracing all designated persons other than officers and their wives and children. A contract carrying out treaty obligations should be liberally construed so as to effectuate the purposes intended by the treaty.

In the light of all the surrounding circumstances it will not be assumed that the United States in carrying out its stipulations for the capitulation of Manila would commit an act of inhumanity such as separating the surrendered officers from their wives and children by furnishing the former with cabin, and the latter with steerage, accommodations on the voyage to Spain under the repatriation provision of the treaty of peace.

42 C. Cl. 318, reversed.

THE facts, which involve the construction of the contract between Ceballos & Co. and the United States for the repatriation of the prisoners of war and other persons from the Philippine Islands to Spain, are stated in the opinion.

Mr. William V. Rowe and *Mr. John J. Hemphill* for appellants.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. Franklin W. Collins* was on the brief, for the United States.

MR. JUSTICE WHITE delivered the opinion of the court.

Speaking in a general sense, this case involves determining how much, if anything, is due by the United States to J. M.

Ceballos & Co., the appellants, for services rendered in pursuance of oral and written contracts for the repatriation of certain persons from the Philippine Islands to Spain. Before coming to the case as made by the record it is necessary to dispose of a preliminary consideration which may throw light upon one of the questions arising for decision.

Ceballos & Co.—who here assert their rights as arising from contracts made, as we have said, concerning transportation of persons from the Philippine Islands to Spain—after the surrender of the Spanish forces at Santiago, made a contract with the United States for the repatriation from Cuba to Spain of the prisoners of war resulting from that surrender. That contract was performed, and it is conceded that all obligations of the United States under the same were discharged. It is admitted, however, that at the trial below the Cuban contract, as it is termed, was offered and the mode of execution thereof was established by competent evidence, upon the assumption that such facts were proper to be taken into view in the elucidation of the particular contracts which are here involved. No finding was made by the lower court on the subject, although one was requested. After the filing of the record in this court a motion was made praying that the lower court be directed to find whether or not the Cuban contract had been made as stated, and whether or not the wives and children of Spanish officers transported thereunder were also transported under the contract, and, if they were, the rate paid for such transportation. The motion was resisted, and action thereon was postponed until the hearing on the merits. In the discussion at bar it was conceded by the Government that the Cuban contract had been offered in evidence below, that the contract was correctly printed in one of the briefs, and that it had been performed in a particular manner. It was, however, insisted that the Philippine contracts here involved were unambiguous, and therefore the Cuban contract was irrelevant. It was conceded, if it was deemed that there was such ambiguity in the Philippine contracts as to require construction, and that

the construction might be elucidated by the Cuban contract and the mode of its performance, that contract and the admission as to the manner in which it had been performed might be treated as part of the record for the purposes of the case before us without the necessity of directing findings on the subject. As we are clearly of opinion that the contracts which are here involved require construction, and that the previous contract between the parties as to the movement of the prisoners of war from Cuba to Spain, and the construction which obtained in the execution thereof, may serve within proper limitations to throw light upon the construction of the contracts here involved we treat the Cuban contract and its mode of performance as embraced in the record, and review the case in the light thereof.

In the month of July, 1898, and from that time until the commencement of this litigation, the members of the appellant firm were the American operators and agents of the Compañía Transatlántica, a steamship line engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands. As such agents Ceballos & Co. executed a contract with the United States, a copy of which is in the margin [1] to safely transport from Cuba to Spain the

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[1] Cuban Contract.

Sealed proposals having been invited for the transportation of the Spanish prisoners of war who surrendered to the United States forces in Cuba, from Santiago de Cuba to Cadiz, or such port of same as might thereafter be designated, and the proposal submitted by J. M. Ceballos & Company of New York, having been duly accepted:

It is hereby, on this twenty-first day of July, 1898, agreed, by and between the Secretary of War of the United States and said J. M. Ceballos & Company, that said company shall transport well and safely all of the troops of Spain that were surrendered by General Toral to the Army of the United States in Cuba, in the capitulation entered into by him at Santiago de Cuba, from said Santiago de Cuba to such port in Spain as the Secretary of War of the United States may designate, and that the Government of the United States will pay for such transportation, and for the subsistence and delivery on shore of the prisoners, the sum

troops of Spain surrendered at Santiago de Cuba. Under this contract the wives and children of Spanish officers were carried in the cabins, and without question, the first-class rate was paid for the transportation.

The city of Manila surrendered the thirteenth of August,

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of twenty dollars ($20) for each enlisted man or private soldier, and the sum of fifty-five dollars ($55) for each officer so delivered.

The said company further stipulates that said subsistence furnished by the company shall be equal to United States Army garrison rations; that cabin accommodations are to be supplied for the said officers, and third-class or steerage accommodations, having suitable galley accommodations with ample space and ventilation for the enlisted men or privates; that for the purpose aforesaid it will have at Santiago de Cuba within seventeen (17) calendar days from this day (that is to say, on or before the seventh day of the month now next following) seven (7) steam vessels with a total capacity for the conveyance of at least ten thousand (10,000) prisoners in conformity with the foregoing stipulations, and ready to take them on board and proceed immediately to Spain; and the remaining vessels, in number and capacity as the Secretary of War may notify the company, within twenty-one (21) days from the date of such notice.

The Secretary of War stipulates that the United States will give safe conduct as against the Army and Navy of the United States to the vessels of the company engaged in the business aforesaid while proceeding to Santiago and from there to Spain, such safe conduct not to apply to ships already seized or in blockaded ports, and the ships employed as aforesaid to have only such armament as is customarily carried by merchant ships. Such safe conduct is to extend to foreign, West Indian, Cuban and Spanish ports, and to remain in effect until the prisoners are unloaded in a Spanish port designated, and is expressly made applicable to steamers of the Spanish Transatlantic Line, under the Spanish flag.

For the better security of such safe conduct a document in the following form and duly signed will be furnished to the company for each ship, which shall be exhibited on demand, together with a copy of this contract, to any officer of the Army or Navy of the United States visiting the vessel:

"The President of the United States to all whom it may concern, greeting: This is to certify that the ——— ——— is employed under contract with the Government of the United States in the business of

1898, and August 14 the United States and Spanish authorities agreed upon written terms of capitulation, of which article 5 is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families and of the expenses which said repatriation may occasion, shall be referred to the Government of the United States at Washington."

The following statement as to the situation at Manila and the making of an oral contract and subsequently of a written contract are taken from findings made below.

There was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers and their families, and a much larger number of enlisted men, together with the wives and children of some of these enlisted men. Many of these were in a pitiable condition physically, exhausted with exposure and disease—1,200 being sick at one time—all of them fed, guarded and attended at

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transporting from Santiago de Cuba to a port in Spain Spanish prisoners heretofore surrendered to the Army of the United States in Cuba; that the Government of the United States has guaranteed safe conduct for this purpose to the ——— ——— in going to and from Santiago de Cuba and until the disembarking of said prisoners in a Spanish port.

"All persons under the jurisdiction of the United States are required to respect such guarantee.

——— ———."

The company further stipulates that it will furnish the bond of ——— for the proper and faithful performance of this contract.

The Secretary of War agrees that the United States will deliver the prisoners aforesaid on board at Santiago within a reasonable time after the vessels are ready, and to the number of at least ten thousand men (10,000) men, five hundred (500) officers, and that the payment of the said twenty ($20.00) dollars and fifty-five ($55.00) dollars for each man and officer to the numbers last aforesaid shall be made when satisfactory evidence that the prisoners have been transported and delivered in accordance with this contract is presented to him.

Witness our hands and seals this twenty-first day of July, 1898.

R. A. Alger, *Secy. of War.*

J. M. Ceballos & Co.

the expense of the United States. Smallpox had been prevalent and infection was apprehended. The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the government of Spain. Many of these had wives and children with them. There were besides a number of civilians, such as nurses, nuns, monks, friars, sisters of charity and lady pensioners. The United States treated all of these classes as prisoners of war, and had supreme control of them after the surrender of Manila until they were delivered aboard plaintiff's ships for transportation, at which time the supervision of the United States ceased. Spanish officers had in the meantime only such supervision over their troops as the United States permitted.

General Otis, commanding the United States forces in Manila, considered that an emergency existed requiring immediate action, and on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but under an oral agreement with Ceballos & Co., as hereinafter stated.

In the emergency deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into an oral agreement with Ceballos & Co., by which the latter agreed to transport such of the Philippine prisoners as the United States desired to return to Spain, the price to be paid for such transportation to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into under the terms of a treaty of peace between the United States and Spain.

Under this oral agreement, Ceballos & Co. immediately began furnishing vessels, and the transportation of the Phil-

ippine prisoners commenced by a vessel which sailed from Manila, November 7, 1898, and continued until another and a written contract was entered into for the transportation of those prisoners not transported under the oral agreement.

The shipments under the oral contract were five in number, and the wives and children of officers were carried in the cabin, as under the Cuban contract.

On December 10, 1898, by the treaty of peace it was stipulated in paragraph 1, article 5, that—

"The United States, will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in article 6, that—

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively under this article."

On January 20, 1899, the Quartermaster General, U. S. Army, by direction of the Secretary of War, invited sealed proposals "for the transportation of the Spanish prisoners of war now in the Philippine Islands . . . to Cadiz or such other ports of Spain as may hereafter be designated." Among other things it was stated in the advertisement as follows:

"Their number is estimated as about 16,000 officers and

enlisted men. Cabin accommodations are to be supplied for the officers and third-class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventiiation, for the enlisted men.

* * * * * * * *

"Proposals will state the price per capita for transporting officers and for transporting enlisted men and for their subsistence and delivering them on shore at the Spanish port, or ports to be designated, and will be accompanied by a guarantee that the prisoners will be comfortably cared for and subsisted while on the journey.

* * * * * * * *

"Payment for the service will be made when evidence is furnished that the ship has arrived with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the quartermaster is to determine the number to be paid for. . . ."

The following bid was submitted:

"Sir: In accordance with the advertisement of Gen. M. I. Luddington, quartermaster general, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Co., agents of the Compañía Transatlántica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

"It is proposed not to load the steamers beyond two-thirds

of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary, owing to climatic conditions and length of voyage.

"I further propose to call at any port of the Philippine Islands that the U. S. Government may designate, provided the vessels can safely lay afloat.

"The charge for this service is dependent on the ports of call in the Philippines, and also on the quarantine regulations in Spain, but I propose and hereby agree to do this service at a price not to exceed in any case:

For each officer.....$215 00
For each enlisted man..... 73 75

"It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

"I will furnish a satisfactory bond for the faithful fulfillment of this service."

This bid was accepted, and on March 4, 1899, a contract was executed between the Secretary of War and Ceballos & Co., by their attorney in fact, which, omitting the attestation clause and signatures, is as follows:

"Whereas, under the terms of the treaty of peace entered into by and between the representatives of the Governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of Article V that—

"'The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces.'

"'And in Article VI, which reads as follows:

"'Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrection in Cuba and the Philippines and the war with the United States.

"'Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"'The Government of the United States will, at its own cost, return to Spain, and the Government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.'

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States:

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the said J. M. Ceballos & Company for the transportation of the said prisoners of war, from the Philippine Islands to Spain, as are designated in the terms of the treaty of peace, referred to and quoted herein.

"The said J. M. Ceballos & Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while en route and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that for the purpose herein stipulated they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third-class or steerage accommodations, space

and ventilation for the enlisted men and other persons on board each ship; that the subsistence furnished by the company shall be equal in every respect to the United States army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and the other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two-thirds of the steerage capacity of each ship as shown in the list referred to.

"In consideration of the faithful performances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees on behalf of the United States to pay to the said J. M. Ceballos & Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars ($215.00), and for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents ($73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers to be paid by the United States at the rate fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of $1.50 for each officer per day and

forty cents for each enlisted man per day. An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

"No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom."

The findings show that the vessels which were supplied to perform this contract, like those which were supplied to perform the Cuban contract and the subsequent Philippine oral contract, were furnished with cabin and steerage accommodations, and that the officers, civil and military, with their respective families, were carried in the cabin, and in the steerage were carried the enlisted men and their families and other persons entitled to third-class passage.

For the first twenty-five shipments payment was made by the United States upon certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, certified to be correct at the place of landing, showing the different classes of passengers.

The court below also found as follows:

The obligation of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war or political prisoners was questioned by the Secretary of War.

On December 18, 1899, the Secretary of War addressed an

official letter to the Attorney General, stating that under the terms of the treaty of peace the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials and their wives and children was not clearly defined, and that the rates of compensation for the transportation of such persons were not set forth in the contract. But in that connection the Secretary requested an opinion as to the construction of the treaty of peace in regard to the scope of the description of Spanish prisoners, whether and to what extent the treaty included the repatriation of non-combatants at the cost of the United States. The Secretary further requested a construction of the contract rate of compensation which might be allowed and paid per captia for each class of persons charged for under the terms of the contract with Ceballos & Co. On January 6, 1900, the Attorney General answered this official communication of the Secretary of War and construed the contract substantially as follows: That it was questionable whether all the persons tendered and transported were not within the purview of the treaty, but that this was a question for the United States authorities and not for the carrier, who would have been guilty or might have been guilty of a breach of his contract in refusing to carry persons designated to be carried by the United States. The Attorney General further informed the Secretary of War that the contract related to the transportation of prisoners; that as between the contracting parties it rested alone with the United States to say whom it would send back to Spain, and in doing so to alone determine who were prisoners and who came within the purview of the treaty or the contract. That the words "other persons" were included within "enlisted men," and that as to all enlisted men and all persons other than officers, military and civil, $73.75, and no more, was payable by the United States under the contract.

On January 19, 1900, the Secretary of War notified one of the firm of Ceballos & Co. that he had, on January 17, cabled

General Otis at Manila that civil officials, prisoners' wives and children were entitled to passage to Spain, and that the contract provided for shipment of civil officials as officers on the basis of $215 per capita; that wives and children of officers, soldiers and civil officials were entitled to transportation to Spain on the basis of $73.75 per capita.

As shown on statement, copied in the margin,[1] the United States paid to Ceballos & Co., under the Philippine oral and written contracts, the sum of $1,544,595. It will be seen that no payments were made in respect of the transportation of other persons than officers and enlisted men until after the Attorney General had rendered the opinion above referred to. Of the various classes of persons specified, all but "officers"

[1] Payments.

Sundry Checks Received by J. M. Ceballos & Co.—Payments on % by United States Government.

	Officers.	Enlisted men.	Women and major children.	Minor children.	Civil officials.	Warrants.	
June 20–99	1019	7067	.....	.....	.....	$666,247.62	($74,028.62, 10% retained by Government.)
Nov. 28–99	131	1198	.....	.....	.....	190,545.12	(inclu. previous 10% as above.)
July 30–1900	288	3728	1302	406	.....	447,853.75	
Oct. 6–1900	148	1425	53	.....	.....	140,822.50	
Apr. 11–1902	.....	.....	.....	.....	393	28,983.75	
Apr. 21–1902	.....	.....	.....	.....	.....	9,746.25	(315 Civ.)
July 3–1902	.....	.....	.....	.....	.....	34,747.50	(Off. @ $141.25, diff. bet. 1st and 3d class.)
Oct. 31–1902	....	16	.....	.....	.....	1,180.00	
	....	19	.....	.....	.....	1,401.25	
	....	6	.....	.....	.....	442.50	
	1	4	.....	.....	.....	510.00	
Nov. 3–1902	1	.....	.....	.....	.....	215.00	
	....	10	.....	.....	.....	737.50	
	....	1	.....	.....	.....	73.75	
Nov. 3, rec'd and ret'd	8	17	6	.....	.....	3,416.25	
Feb. 26–1903, deposited	1	1	2	.....	.....	436.25	
	5	91	.....	.....	.....	7,786.25	
	9	.....	.....	.....	.....	1,935.00	
M'ch 7–1903	...	.....	12	.....	18	4,755.00	
Sup. Bill No. 22	....	.....	8	.....	2	1,020.00	
	...	.....	9	.....	3	1,308.75	
	...	.....	1	.....	.....	73.75	
	2	less not	1 all'd	.....	.....	356.25	
Totals	1613	13583	1392	406	416	$1,544,595.00	

were paid for at steerage or third-class rates, and this regardless of whether cabin or steerage accommodations were furnished. Minor children, that is, those under the age of ten years, were paid for at half the adult rate.

On August 15, 1908, Ceballos & Co. commenced this action in the Court of Claims to recover a balance alleged to be due under the Philippine contracts for the carriage of 3,445 cabin passengers at $215 each; 415 minor children, carried in cabin at half rate, $107.50; 13,647 steerage passengers at $73.75 each, and 20 minor children carried in steerage at half steerage rate, $36.75 each. For this service it was averred $1,792,491.25 had been earned, and after deducting payments of $1,544,595 there was still due Ceballos & Co. $247,896.25. Subsequently an amended petition was filed, in which full adult cabin and steerage rates were demanded for minor children, increasing the alleged indebtedness of the United States to the sum of $293,246.25.

A counterclaim, contained in three numbered paragraphs, was filed on behalf of the United States. In paragraph first it was in substance averred that the United States was entitled to recover back from the claimants the sum of $371,988.75, paid for the transportation of persons under the alleged oral contract in November and December, 1898, and January, 1899, because the same was paid without authority of law prior to the execution of any contract, expressed or implied, between the United States and Ceballos & Co., or any one in its behalf. In paragraph second an indebtedness from Ceballos & Co. of $12,788.75 was alleged, because of moneys paid to the firm for the transportation of persons who were not actually landed in Spain as required by the contract. In paragraph third it was averred that as to two shipments made on November 25, 1899, and December 18, 1899, the claimants by means of a supplemental bill had collected a second time transportation charges for fourteen military officers (at the rate of $215 each) and 91 enlisted men (at the rate of $73.75 each), whereby $9,721.25 had been overpaid by the United States to Ceballos & Co.

There was contention then in the court below in regard to the number of persons carried from the Philippines to Spain and as to the compensation to be paid. For the Government it was urged that, deducting the overcharge covered by the third counterclaim for the transportation of 105 persons, payment in full had been made for all persons legally shown to have been transported, viz., 17,305 persons. On the other hand, the appellants contended that 17,527 persons had been carried, a difference of 222 persons. As to such excess the Government alleged it had refused payment as to 198 persons, because it had not been shown by the evidence stipulated for in the contract that such persons had embarked and been carried to Spain, and that it had refused payment as to the remaining 24, because twice counted.

The dispute as to compensation arose from the contention by Ceballos & Co. that it had carried the wives and children of Spanish military officers and civil officials in the cabin and the cabin rate was properly chargeable, while the Government insisted that the steerage rate applied and had been paid. Ceballos & Co. also contended that for the carriage of other non-combatants, who were entitled to be considered prisoners of war, the cabin rate applied, whereas the Government contended that all non-combatants were embraced within the category of "other persons," who under the contract were to be carried in the steerage and paid for at the steerage rate.

The court rejected the first and second counterclaims of the Government and allowed the third. It sustained the contention of the United States as to the number of persons carried to Spain and the rate of transportation which governed, except it was held that Ceballos & Co., instead of being paid half adult steerage rate for the transportation of minor children, should have been allowed the full adult rate for each child, and judgment was entered on that basis, in favor of Ceballos & Co., for the sum of $5,391.25. 42 Ct. Clms. 318.

Without hereafter reproducing the findings verbatim, we

shall state, in a condensed form such of the facts found as we think material to be recited.

Ceballos & Co. alone have appealed and the argument at bar on their behalf has been confined to two questions. 1, the construction of the contract in respect to the persons entitled to be carried at cabin rates; 2, the correctness of the action of the court below in disallowing the claim for the alleged transportation of 198 persons, asserted to have been actually carried under the contracts.

The court below substantially followed the construction of the contract adopted by the Attorney General, and decided that the "higher rate" specified in the contract related to one class and the lower rate to another class, and within the second class the contract embraced priests, nuns, sisters of charity, all women and children and every other person designated within the term "prisoners" by the United States, and whether carried in the cabin or steerage. Civil officials were held entitled to be classified with military officers and their transportation properly chargeable at the cabin rate.

In disposing of the questions arising for consideration we will first consider that relating to the 198 persons claimed by the appellants to have been transported to Spain, but for whose transportation the United States refused to make payment. As already mentioned, for the first twenty-five shipments of prisoners of war from the Philippine Islands to Spain payment was made by the Government of the United States upon the certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, showing the different classes of passengers certified to be correct at the place of landing.

The method of determining the persons entitled to transportation under the written contract was, however, changed as to the last fifteen shipments—running from February 20, 1900, to July 14, 1901, during which time it is claimed said 198 persons were carried to Spain—so that requests for transportation with reference to available space were required to

be made upon the appellants. Thereupon the United States quartermaster at Manila made demand upon the appellants in writing to furnish transportation "to the following Spanish prisoners," separately enumerating, as the case might be, the number of commissioned officers, the number of enlisted men, the number of civil officials, the number of wives of officers and officials, the number of children under three years of age, the number of children between three and ten years of age, the number of children over ten years of age, etc.

Pursuant to the requisition of the Quartermaster General all the men who were placed on the list of passengers for each shipment were required to be at a particular place at a certain time in the morning, and they were counted by an officer of the Quartermaster's Department and taken aboard launches and carried out to the Spanish vessel ready to sail; and as they went on board the persons mentioned in the requisitions were counted by another United States officer, accompanied with the officer who represented the steamship company. Occasionally permission was given to officers of considerable rank to go aboard in their own conveyances, and these were checked off when they went aboard by an officer representing the Government and an officer representing Ceballos & Co., and were thereby included in the numbers called for by the requisitions.

No objections were offered by Ceballos & Co. at the time of the change in the method of computing the number of persons to go aboard.

The 198 persons in question were not embraced in the requests sent by the quartermaster for transportation nor were they included in the count at the time and place of embarkation. The accounts presented to the Treasury for payment asked compensation for the transportation of such persons, based upon certificates signed by the American consul at the landing place in Spain, to the effect "that the following Spanish prisoners," classifying the persons substantially as in the requisitions above referred to, had been "furnished transportation from Manila, P. I., to Spain," by the appellants on a

named steamship. For the reason that the method prescribed by the contract for determining the initial fact that the persons had been taken on board in the Philippine Islands by the appellants had not been pursued, and further because the evidence did not establish to the satisfaction of the court that said 198 persons, although certified by the consul to have been landed in Spain, were entitled to transportation under the contract, the Court of Claims refused to make any allowance for the transportation of such persons. The passages of the contract relating to this branch of the controversy are as follows:

"An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the Government of the United States and a representative of the said J. M. Ceballos & Co., and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship."

After reciting the compensation to be paid, the contract recited:

"The said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain."

In refusing to make any allowance for the asserted transportation of these 198 persons, we cannot say, in view of the findings of the court below, that error was committed.

We come to consider the remaining subject of contention, which is thus succinctly stated in the third specification of error made in the brief of counsel for Ceballos & Co.: "The court erred in holding that the wives and children of Spanish officers, civil and military, and other non-combatant prisoners of war, although transported as first-class passengers and afforded cabin accommodations aboard ship, were to be paid for at the third-class rate specified in the contract, to wit, $73.75."

The principal question involved in this assignment is whether the United States shall pay cabin rates for the transportation of the wives and children of Spanish officers, and other officials of equal rank, who were in fact returned to

Spain with such officers as cabin passengers. As stated in the findings the oral agreement made in October or November, 1898, between Ceballos & Co. and the Secretary of War was "to transport such of the Philippine prisoners as the United States desired to return to Spain," the compensation therefor to be fixed by the written contract which was expected to be thereafter entered into. There was no substantial change in the method of carrying out this oral contract from that pursued with respect to the Cuban contract. In the Philippines, as in Cuba, the United States tendered with the military officers and civil officials which it desired carried to Spain their wives and children. The proposals invited as the basis of a written contract, were couched in similar phraseology to that employed in the Cuban contract, and called for proposals for the transportation "of the Spanish prisoners of war now in the Philippine Islands . . . in number estimated as about 16,000 officers and enlisted men." When, therefore, Ceballos & Co. submitted a bid for furnishing such transportation, in reason they held themselves out as ready if the United States tendered for transportation the wives and children of the officers and enlisted men of the Spanish forces to regard them as entitled to the same treatment required by the Government for the head of the family. We cannot impute to the parties to the contract an intention to condemn and refuse to give effect to the practice which had been pursued in carrying out the oral agreement, that is, the treating the wives and children as entitled to transportation and as being for the purpose of the accommodations to be furnished, of the class to which the Government had in effect assigned their male relatives. That the classification referred to as "such other persons as may be designated by the Secretary of War" was not intended to embrace the wives and children of officers, is, it seems to us, manifest from the entire text. The Government was concerned not only with the furnishing of safe but of comfortable accommodation to those who were to be carried on the long voyage from Manila to Spain. It exacted from

Ceballos & Co. a stipulation that it should provide "safe and comfortable transportation" for those to be carried; the officers with "cabin accommodations," and "third-class or steerage accommodations, space and ventilation to be supplied for the enlisted men and other persons on board each ship." It is to be presumed that the agents of the United States in the Philippines saw to it that this stipulation of the contract was observed. It is inconceivable, however, that the Government or the appellants intended to commit such an act of inhumanity as would necessarily have arisen if the written contract required that the family of an officer should be separated from the husband and father on shipboard and be relegated to the discomforts of the steerage and the society of enlisted men and other persons. Clearly the spirit of the contract is opposed to any such conception. The wives and children of the officers and enlisted men were associated with them in the written terms of capitulation of the Spanish forces at Manila, signed August 14, 1898, the fifth article which, again reproduced, is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families, and of the expenses which said expatriation may occasion, shall be referred to the Government of the United States at Washington."

Under the Cuban contract the wives and children of officers were treated as entitled to be classed with the head of the family in respect to the accommodation to be supplied, and in the performance of the Philippine oral contract a like practice was pursued. In effect, therefore, by a course of conduct the United States had associated the wives and children of the officers and enlisted men with such officers and men for the purpose of the transportation to be furnished and the treatment to be accorded them on the homeward voyage. Just as in the opinion rendered by the Attorney General, civil officials of equal grade with military officers were assimilated to such officers in construing the terms of the contract, so we think an enlarged meaning must be taken as intended by

the terms officers and enlisted men where employed in the written contract. As observed by the Attorney General, in the light of the purpose of the contract, which was to carry out the engagements made by this Government with Spain, a liberal construction should be accorded to the terms employed in order to effectuate to the fullest extent the purposes intended by the treaty. Construing the written contract of March 4, 1899, according to its manifest spirit, and looking to the prior conduct of the parties, we are of opinion that such contract and the oral contract which was dependent upon it, so far as the wives and children of officers and enlisted men were concerned, should receive the same construction as under the Cuban contract, viz., that the wives and children of Spanish officers tendered by the United States for transportation were to be classed with such officers and the wives and children of enlisted men were to receive like accommodations as were given to enlisted men.

As it is not questioned by the United States that civil officials representing the Spanish government in the Philippines were entitled, both under the oral and written contracts, to cabin accommodations, we have assumed that construction to be well founded. It follows from the reasoning heretofore employed that the wives and children of such officials were likewise entitled when tendered by the agents of the United States for transportation to receive cabin accommodations, and Ceballos & Co. on furnishing such accommodations were entitled to compensation at the rate stipulated for cabin service. In view, however, of the distinction shown to have been made in the requisitions for space between adults and minor children, the practice shown as to payments made under the contract and the original demand of Ceballos & Co. in the court below, we think it results that the parties in actual practice treated the full rate for children under ten years as but half the adult rate specified in the contract, and we think that rate ought to have been applied by the court below for each minor child, whether carried in the cabin or in the steerage.

We are unable to yield our assent to the contention that other non-combatants than the wives and children of officers, enlisted men, and officials of the government of Spain should be embraced in the class entitled as of right to cabin accommodations for which appellants were entitled to be compensated at cabin rates. The mere circumstance that a particular person, although a non-combatant, was a constructive prisoner, did not—at least in the absence of evidence that the United States tendered such person as a cabin passenger—serve to take the person out of the category of persons whom the Secretary of War might designate to receive transportation in the steerage at third-class rates.

From finding XIV it appears that the wives and children above the age of ten years of military officers and civil officials aggregated 1,327, and that the appellants were paid for the transportation of each the steerage rate of $73.75, instead of the cabin rate of $215 each. The appellants are, therefore, entitled to a further payment on account of the transportation of such persons of $141.25 each, in all, $187,438.75. It is also shown in such finding that the number of children of Spanish military officers and civil officials who were carried to Spain and were under the age of ten years aggregated 395, and that Ceballos & Co. were paid for their transportation $36.87½ each, one-half the adult steerage rate, instead of $107.50 each, one-half the adult cabin rates. Ceballos & Co. were, therefore, entitled for such service to a further payment as to each child of $70.62½, aggregating for the 395 children $27,896.87. From the total of these sums, viz., $215,335.62, must, however, be deducted the overpayment recited in the third counter-claim (which counter-claim the court below sustained), viz., $9,721.25, leaving due to Ceballos & Co. the sum of $205,614.37.

It results that the judgment of the Court of Claims must be reversed, with instructions to enter a judgment in favor of the appellants for the sum of $205,614.37, and

It is so ordered.